

III. PLAINTIFF’S NUISANCE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO PLEAD A NON-TRESPASSORY INVASION AND FAILS TO ALLEGE ANY ONGOING ACTIVITY BY NSRC.

Assuming the claims against NSRC are not dismissed in their entirety for the reasons discussed above, Plaintiff still has not alleged the requisite elements of a nuisance cause of action for two reasons: (1) Plaintiff fails to allege a non-trespassory invasion as is necessary for a nuisance claim; and (2) Plaintiff alleges a single, sporadic event; not substantial interference.

a. The Complaint Alleges a Trespass, Not a Nuisance.

A nuisance is defined as an activity that “endangers life or health, or obstructs the reasonable and comfortable use of property.” *National Energy Corp. v. O’Quinn*, 223 Va. 83, 85, 286 S.E.2d 181, 182 (1982). In contrast to a trespass claim which involves an unauthorized entry or physical invasion, a private nuisance is an activity which substantially and unreasonably interferes with the use and enjoyment of another’s property without dispossessing the plaintiff of any possessory rights. *See Haywood v. Massie*, 188 Va. 176, 182 (1948) (“Generally speaking, there is a distinction between a nuisance and a trespass, although many things are sometimes called nuisances which are mere trespasses, and it has been said that an action for a nuisance which violates a property right incident to the ownership of land is in the nature of one for trespass to realty.”); *see also* PRAC. TORT AND PERSONAL INJURY LAW § 8:2 (a trespass is “a physical invasion on the land of another, which could include an unauthorized entrance on the land by a person ... or object on the land” in contrast to that which “interfere[s] with the plaintiff’s use and quiet enjoyment of her land” and does “not dispossess the plaintiff of any possessory rights to her land” for which “a cause of action would properly lie in the tort of nuisance.”); *Restatement Second of Torts* § 821D (“A private nuisance is a nontrespassory invasion of another’s interest in the private use and enjoyment of land”); *Prosser and Keeton on*

Torts p. 622 (West 5th ed. 1984) (“The distinction which is now accepted is that trespass [to land] is an invasion of the plaintiff’s interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it.”).

As the factual basis for the nuisance claim, the Plaintiff alleges that NSRC “failed to implement a proper overflow drainage system” and that NSRC’s alleged “use” of its property redirected excess drain water onto the Plaintiff’s property and into the basement of her home. (Compl. ¶¶ 31, 35, 72.) These facts do not state a claim for nuisance for a simple reason: Plaintiff alleges a physical invasion and not an interference with the use and enjoyment of her property. Even viewed in a light favorable to Plaintiff, Count III of the Complaint alleges an unauthorized entry and physical invasion. Such facts do not state a claim for nuisance. *See Haywood*, 188 Va. at 182; *Restatement Second of Torts* § 821D (“A private nuisance is a nontrespassory invasion of another’s interest in the private use an enjoyment of land”). Moreover, Plaintiff’s alleged injuries do not arise from the presence of the Culvert itself, but rather from flood water that allegedly came from Mountain Valley Pipeline’s right-of-way property, overflowed culverts owned by NSRC, and subsequently diverted onto the Property. Because Plaintiff’s factual allegations fails to establish the requisite elements for a nuisance claim, Count III of the Complaint should be dismissed.

b. The Complaint Alleges an Isolated Incident and Not a Recurring Condition.

Furthermore, Plaintiff fails to allege any repeated or “recurring” conduct required for a nuisance claim. “[A] private nuisance is an activity which unreasonably interferes with the use and enjoyment of another's property.” *City of Newport News v. Hertzler*, 216 Va. 587, 592 (1976). Allegations of “sporadic or isolated” events do not meet the level of misconduct necessary for a nuisance claim. *Id.* at 594 (holding that, under Virginia’s nuisance law, “[m]ore

than sporadic or isolated annoyances must be shown. . . . The interference must be substantial”) (citing *Senatore v. Blinn*, 342 Mass. 778, 778 (1961) (“It cannot be said from the reported facts that the use of the defendant's premises has been so persistent and unreasonable that an injunction is justified.”)).

In this case, Plaintiff alleges a single “significant rainfall” on August 3, 2018, causing NSRC’s culverts to back up, and diverting the floodwater onto Plaintiff’s property. (Compl. ¶¶ 30-33.) This single, isolated event does not establish an unreasonable interference with Plaintiff’s use of her property. *See City of Newport News*, 216 Va. at 592. While the Complaint later asserts that NSRC’s acts are a “recurring condition,” Plaintiff fails to provide any facts indicating that flooding has occurred on more than one occasion. Since Plaintiff has not alleged that NSRC “substantially interfered” with Plaintiff’s use of her property as defined under Virginia law, her claim for nuisance should be dismissed.

IV. PLAINTIFF’S NEGLIGENCE CLAIM, AS IT RELATES TO PLAINTIFF’S PERSONAL INJURIES, SHOULD BE DISMISSED BECAUSE NSRC’S ALLEGED CONDUCT DID NOT PROXIMATELY CAUSE PLAINTIFF’S ALLEGED INJURIES.

Aside from Plaintiff’s property damages, the Complaint alleges that Defendants’ alleged negligence caused Plaintiff to be “deprived” of her home and move to a hunting camp in West Virginia, and that the living conditions at the hunting camp caused her to suffer personal injuries. (Compl. ¶¶ 38-40.) Even assuming the facts of the Complaint are true, NSRC’s alleged negligence did not proximately cause Plaintiff’s injuries.

In Virginia, to establish a prima facie negligence claim, a plaintiff bears the burden of proving “the existence of a legal duty, a breach of the duty, and proximate causation resulting in damage.” *Atrium Unit Owners Ass’n v. King*, 266 Va. 288, 293 (2003). “Negligence cannot be presumed from the mere occurrence of damage. The burden is on a plaintiff to produce evidence

of preponderating weight from which the trier of fact can find that the defendant was guilty of negligence which was a proximate cause of the event resulting in damage.” *Town of W. Point v. Evans*, 224 Va. 625, 627–28 (1983). “The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred.” *Beale v. Jones*, 210 Va. 519, 522 (1970).

While Plaintiff’s alleged property damages could foreseeably arise from NSRC’s alleged mismanagement of its Culverts, NSRC could not reasonably foresee that its alleged acts or omissions would cause Plaintiff to voluntarily abandon her primary residence and sustain personal injuries while residing at a hunt camp with sub-par living conditions. Thus, the conditions at the hunting camp are an superseding, intervening cause of Plaintiff’s injuries wholly removed from any alleged misconduct by NSRC. Because Plaintiff’s personal injuries alleged in the Complaint were not foreseeably caused by NSRC’s alleged acts or omissions, Count I of the Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, Norfolk Southern Railway Company moves to dismiss, with prejudice, Counts I-III of the Complaint.

WOODS ROGERS PLC
ATTORNEYS AT LAW

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY and
NORFOLK SOUTHERN CORPORATION

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WOODS ROGERS PLC
ATTORNEYS AT LAW

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served upon
counsel of record via the CM/ECF system and/or regular mail on this 28th day of August 2020:

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Applicant Details

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 Citizenship Status **U. S. Citizen**
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 Address

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227 Hanna Ln
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Lexington
State/Territory
Virginia
Zip
24450
Country
United States

Contact Phone Number **7139099400**

Applicant Education

BA/BS From **University of Texas-Arlington**
 Date of BA/BS **May 2011**
 JD/LLB From **Washington and Lee University School of Law**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=54704&yr=2009
 Date of JD/LLB **May 7, 2021**
 Class Rank **50%**
 Does the law school have a Law Review/Journal? **Yes**
 Law Review/Journal **No**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Robert J. Grey, Jr. Negotiations Competition**
Mediation Competition
Client Counseling Competition
Mock Trial Competition
John W. Davis Appellate Advocacy Competition

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **No**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Recommenders

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References

Name: Bethany Salpietra
Email: bethany.salpietra@bakerbotts.com
Information: I was Bethany's paralegal in the IP department of Baker Botts in Dallas, Texas.

Name: Ziven "Scott" Birdwell
Email: zsbirdwell@gmail.com
Information: I worked on several projects as an intern at the SEC with Scott.

Name: Todd Peppers
Email: peppersT@wlu.edu
Information: I am Professor Pepper's Research Assistant and was a student in his Administrative Law Class.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

227 Hanna Ln
Lexington, VA 24450

August 26, 2020

Honorable Judge Elizabeth W. Hanes
United States District Court, Eastern District of Virginia
701 E Broad St
Richmond, VA 23219

Dear Judge Hanes,

I am writing to apply for the honor to clerk with you in the Eastern District of Virginia. As a third-year student at Washington and Lee University School of Law, I have been learning the legal theories behind what I saw in practice as a paralegal before I came to law school. I am interested in clerking with you due to the location in Richmond, VA, and due to your past work.

Prior to law school I had the opportunity to speak with many people about their experiences clerking. Every single one of them discussed at length how their experience was fulfilling, challenging, and made them a better litigator. I am interested in litigation because I excel in a fast-paced environment. I enjoy and excel in environments where there are constant deadlines I need to juggle. In my three years as a litigation paralegal at Baker Botts, I have seen first-hand how fast-paced working environments can foster innovation and creativity. While the hours can be challenging and the environment can be stressful, finding ways to deliver solutions makes it all worth it.

This summer, I had the opportunity to work at the United States Securities and Exchange Commission as an Honor Student Volunteer with the Office of International Affairs. In this unit I was able to write memos regarding foreign laws and treaties' impact on civil litigation, especially discovery in the United States.

Throughout my time at Washington and Lee and my summer internships, I have refined both my legal research skills, as well as my ability to clearly and succinctly convey information. Working with you would allow me to continue to grow as a legal writer and researcher and to progress toward my ultimate goal of becoming an effective litigator. I am confident that background, skills, and work ethic would be an asset.

Thank you for your time and consideration. Please let me know if you need any further information or additional materials. I look forward to hearing from you soon.

Sincerely,
Autumn Dickerson

Autumn Dickerson

dickerson.a21@law.wlu.edu • 713.909.9400 • 227 Hanna Ln Lexington, VA 24450

EDUCATION

Washington and Lee University School of Law, Lexington, VA May 2021

Candidate for Juris Doctor (GPA: 3.348/4.0)

Involvement: Vice President, Disabled Law Students Association
Client Counseling Chair, Moot Court Executive Board (2020 – 2021 Academic Year)

- **Internal Competitions:**
 - Semifinalist-Client Counseling Competition
 - Quarterfinalist-Mock Trial Competition
 - Participant-Mediation Competition, Robert J. Grey, Jr. Negotiations Competition, and John W. Davis Appellate Advocacy Competition
- **External Competitions:**
 - HNBA 2020 Corporate Counsel and Moot Court Competition – 2nd Place Respondent Brief
 - Semifinalist - ABA Law Student Division Regional Client Counseling Competition
 - American Association for Justice Student Trial Advocacy Competition (Canceled due to COVID-19)

University of Texas at Arlington, Arlington, TX May 2011

Bachelor of Arts in History

EXPERIENCE

Security Exchange Commission – Office of International Affairs, Washington, DC. May 2020 - present

Student Honors Volunteer

Research and draft memoranda regarding investor protection, cross-border securities transactions and the Foreign Corrupt Practices Act.

Washington and Lee University School of Law, Lexington, VA April 2019 – present

Research Assistant – Dr. Todd Peppers

Compile data and architect data structures to be used in upcoming book on Supreme Court Clerks.

Lone Star Legal Aid, Houston, TX May 2019 – July 2019

Legal Intern

Researched and drafted legal memoranda regarding driver's license suspension in anticipation of litigation. Attended court in misdemeanor and family court matters.

Baker Botts, Dallas, TX July 2015 – June 2018

Paralegal; Paralegal Clerk – I.P. Litigation

Generated disclosures of deposition designations and maintained exhibit lists. Assisted with federal false advertising jury trial in Delaware. E-filed documents in federal and county courts.

Held the position of lead clerk with respect to complex matters: 3 trials in 3 months, involving millions of pages of production, over 100 depositions, complex technology and multiple patents asserted and defended. Lead paralegal at federal bench trial in E.D. Tex.

Ramsey Law Group, Houston, TX May 2015 – July 2015

Paralegal

Texas Law Shield, Houston, TX November 2014 – June 2015

Members Services

Jackup Structure Alliance Inc., Houston, TX October 2011 – September 2013

Document Control Manager; Administrative Assistant

INTERESTS

Interests: Fencing, creating wax paintings, volunteering, and baking with the Great British Bake Off.

Autumn Dickerson
Washington and Lee University School of Law
Cumulative GPA: 3.348

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Doug Rendleman	B+	4	
Contracts	Mark A. Drumbl	A-	4	
Criminal Law	Nora V. Demleitner	A-	3	
Legal Writing I	Sheryl Buske	B-	2	
Torts	Brian Murchison	B+	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Todd C. Peppers	B	3	
Legal Research	Jennifer Mart-Rice	B+	1	
Legal Writing II	Sheryl Buske	B	2	
Professional Responsibility	Sarah Haan	A-	3	
Property	David Eggert	B+	4	
Transnational Law	Russell A. Miller	B	3	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Russell A. Miller	B	4	
Evidence	C. Elizabeth Belmont	A-	3	
Healthcare Law	Nora V. Demleitner	P	3	
Mass Atrocities Seminar	Mark A. Drumbl	A-	2	
Negotiation/Conflict Resolution Prac	Frank Morrison	B+	2	
Sales	Joshua A.T. Fairfield	A-	3	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Research	Alex Zhang	CR	2	
Business Associations	Karen Woody	CR	4	
Fed Income Tax of Individuals	Michelle L. Drumbl	CR	3	
Inter-School Client Counseling Comp		CR	1	
Securities Regulation	Karen Woody	CR	3	
Trial Advocacy Practicum	Charles N. Dorsey	CR	3	

Due to the impact of Covid-19 classes were graded as "Credit Received" or "No Credit Received."

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
SYDNEY LEWIS HALL
LEXINGTON, VA 24450

August 27, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to offer my strongest possible support for Autumn Dickerson's candidacy for a clerkship in your chambers. Her intelligence, dedication, attention to detail, and practical experience will make her a superb addition to your chambers. She will come to you ready to work and able to produce at the highest levels.

I learned to know Autumn in my Sales class. Commercial code courses are detail-oriented and complex. Autumn was the go-to student in the course for hard questions of code interpretation. She put in the time, parsed complex and often conflicting provisions carefully, and brought a wealth of real-world litigation experience to the table. She worked harder than any other student in the class, and it showed. She received one of the highest grades in the course, and was far and away the most effective discussant. She volunteered for the hardest, most tangled questions, and answered with a precision and confidence that comes only from a mix of dedicated study and practical knowledge. When Autumn was working on a question, I increased the difficulty level, pushed into the practical realities of how an Article 2 rule would play out, and talk through the consequences. She rose to the challenge again and again during the semester, and her focus and dedication anchored the entire class.

Autumn is also a true pleasure to work with. She puts in long hours and thrives on managing multiple deadlines, while keeping a sense of humor and passion for the work. She will hit the ground running in your chambers. She has my highest possible recommendation. Please do not hesitate to contact me via email at fairfieldj@wlu.edu, or on my personal cell at 540.490.0457, if I can advance her candidacy in any way.

Warmest regards,

Josh Fairfield
William Donald Bain Family Professor of Law

Joshua Fairfield - fairfieldj@wlu.edu - 540-458-8529

WASHINGTON AND LEE UNIVERSITY
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SIDNEY LEWIS HALL
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August 27, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing this letter of recommendation on behalf of Autumn Dickerson, who has applied for a clerkship in your chambers. Simply put, Autumn is an outstanding young woman who will be a great law clerk. For the reasons listed below, I recommend her to you enthusiastically and without reservation.

Last year, Autumn was a student in my Administrative Law class. Autumn sat in the front row, and she caught my attention during my first lecture because of the enormous amount of Diet Coke she consumed. As a fellow Diet Coke drinker (I'm not, however, in Autumn's league), her caffeine consumption became a running joke throughout the semester and I got to know Autumn fairly quickly.

I discovered, to my delight, that Autumn was a bright, hard working and charming young woman with a quick wit. Her questions in class showed a sophisticated understanding of the material, and Autumn soon became one of my "go-to students" who I could call on when other students were struggling with the material. Administrative Law can be a murky topic (sometimes for the instructor as well as the students), but Autumn came prepared to class and was able to field some of my more challenging questions. While Autumn received a perfectly solid grade in class, it does not fully reflect her abilities or her mastery of the material.

Autumn has balanced her academic studies with a host of extracurricular activities. What is important to note is that Autumn is not a merely hopping from activity to activity, but she is doing well in all of them – from her placing in multiple internal and external moot court competitions to taking an active leadership role in important law school committees and organizations. On top of that, Autumn has proven to be a wonderful research assistant. I've given Autumn a series of complex research assignments involving the Lewis Powell Archives (located at the law school), and her work product has been excellent.

Having once clerked in the federal courts, I know how important "chamber fit" is. I can confidently say that Autumn will be a perfect addition to your court family. She is a friendly and down-to-earth young woman who is confident in her abilities yet doesn't take herself too seriously. She works hard with a minimum of instruction, and she does not require supervision when completing her research assignments.

Justice Felix Frankfurter had an expression that he used when speaking of his best law clerks. "I bet on him," Frankfurter would say. Well, I bet on Autumn. And your bet on Autumn will pay dividends.

Please let me know if there is any additional information that I can provide.

Most sincerely yours,

Todd C. Peppers
Visiting Professor of Law

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The following writing sample is an excerpted memo requested by my supervising attorney at Lone Star Legal Aid. This memo addresses the applicability of *Fowler v. Benson*, Nos. 17-2504/18-1089, 2019 U.S. App. LEXIS 13747 at 2 (6th Cir. May 8, 2019) to Texas state law in anticipation of the Fifth Circuit adopting the reasoning in *Fowler*.

Rule Statement

Fowler, when determining if there was a property interest stated:

Property interests, of course, are not created by the Constitution. Rather they are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlements to those benefits.

Fowler v. Benson, Nos. 17-2504/18-1089, 2019 U.S. App. LEXIS 13747 at 13 (6th Cir.

May 8, 2019), citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

Applicable State Laws

Michigan State Law -

Fowler requires the examination of state laws to see if a property interest was created. The Michigan state law at issue in *Fowler v. Benson*; M.C.L.A § 257.321a states:

(1) Failure to appear or answer a citation is reportable to the Secretary of State and equal to a misdemeanor punishable by imprisonment up to 93 days or a fine not more than \$100.

(2) Failing to comply with judgment of a court within 14 days of notice given forces the Secretary of State to suspend the license

Texas State Law -

The analogous Texas state law states at Tex. Code of Crim. Proc. Ann. Art. 45.041¹ as follows:

The justice or judge shall inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs. If the justice or judge determines that the defendant does not have sufficient resources or income to immediately pay all or part of the fine and costs, the justice or judge shall determine whether the fine and costs should be: (1) required to be paid at some later date or in a specified portion at designated intervals; (2) discharged by performing

¹ See also Tex. Code Crim. Proc. Art. 45.0491 (stating waiver of payment of fines and costs for certain defendants and children if the defendant is indigent or doesn't have resources to pay all or part of the fine.)

community service under . . .; (3) waived in full or in part under Article 45.0491; or (4) satisfied through any combination of methods under Subdivisions (1)-(3)

Application of Fowler to a Possible Texas Case

Plaintiffs must have a property interest created by state or federal law to assert a violation of due process under *Fowler*. In Texas, there are several laws regarding indigent individuals and their ability to pay fines and fees.² Tex. Code of Crim. Proc. Ann. Art. 45.041 states: “. . . [A] judge **shall** inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs.” (emphasis added). Then, the statute enumerates several ways an indigent person can discharge their debt. In *Fowler*, the court emphasized that Michigan law did not address a litigant inability to pay the court debt.³ Consequently, the court determined that no property interest had been created. Texas, however, does address inability to pay, suggesting that under *Fowler*, there is a possibility that the state created a property right for indigent individuals in keeping their driver’s license, should they have fines.

Fowler uses three cases to determine if state law established the claimed entitlement.⁴ *Fowler* first turns to *Roth*.⁵ Analyzing the *Roth*, the *Fowler* court concludes that the property interest is based on specific terms of the professor’s employment. Therefore, when applied in *Fowler*, there is no property interest given that none were enumerated in the terms the government had set forth.⁶

² See Tex. Code Crim. Proc. Art. 45.0491, *See also* Tex. Code of Crim. Proc. Ann. Art. 45.041

³ See *Fowler v. Benson*, Nos. 17-2504/18-1089, 2019 U.S. App. LEXIS 13747 at 18 (6th Cir. May 8, 2019) (stating “Neither the district court nor Plaintiffs identify any legal authority showing that Michigan law directs anyone to consider a license holder’s indigency as part of the process of suspending his driver’s license for failure to pay court debt.”)

⁴ See *id.* at 16.

⁵ See *id.* at 13–14 (discussing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), a case where a professor sued the school for not renewing his teaching contract without notice or a hearing).

⁶ See *id.* at 15-16 (“*Roth* illustrates the point because its holding depended on examining the nature of the claimed property interest (in continued employment) and seeing if the professor enjoyed an entitlement to that interest under the relevant law.”)

The application of *Fowler's* analysis of *Roth* to a possible Texas case requires analysis of the terms giving indigent drivers rights. Tex. Code of Crim. Proc. Ann. Art. 45.041 directs the court to inquire as to the financial capability of the driver to pay and also sets forth options if the driver is unable to pay. Judges must analyze the financial situation of the driver. That requirement creates a property interest under *Roth*: Under *Fowler's* interpretation of *Roth*, a Texas indigent plaintiff would have a property interest of having a judge determine if they have an inability to pay court fees. This analysis does not create a general property interest for all indigent plaintiffs in Texas to keep their licenses, but creates an interest in the hearing to determine one's inability to pay and have an opportunity to change the fine or require community service.

The court in *Fowler* also looks at *Bell*.⁷ In *Bell*, the state law at issue looked to liability for accidents as a determining factor. Prior to a license suspension, the law required a liability hearing to determine fault. Applying *Fowler's* interpretation of *Bell* to a Texas case would involve interpretation of Tex. Code of Crim. Proc. Ann. Art. 45.041. While *Bell* discusses the focused on liability and the rights afforded to the driver, Texas law focuses on the inability to pay. Under this interpretation, the court would not be allowed to suspend a Texas driver without first having a hearing or some determination of the ability to pay.

Turning to the third case, *Memphis Light*,⁸ the court stated there was a right to a pre-termination hearing for utilities because state law created the right avoid termination of utility services without good cause. This interpretation creates the same interest as *Bell* and, under Texas law, requires a hearing to determine one's inability to pay before a license is suspended.

⁷ See *Fowler v. Benson*, Nos. 17-2504/18-1089, 2019 U.S. App. LEXIS 13747 at 16-17 (6th Cir. May 8, 2019) (discussing *Bell v. Burson*, 402 U.S. 535 (1971) a case where Georgia's taking of a driver's license before a liability hearing violated the plaintiff's due process).

⁸ See *id.* (discussing *Memphis Light, Gas, and Water Div. v. Craft*, 436 U.S. 1 (1978), where Tennessee law established the right to not have utility services terminated unless good cause is shown and the absence of any pre-termination opportunity for a hearing violated due process).

When these cases are applied in *Fowler*, the court states that the plaintiffs are not asking for an injunction to defend their property interest in their driver's licenses.⁹ Instead the plaintiffs requested a preliminary injunction to defend their property interest as indigent individuals to maintain their driver's licenses when state law required suspension due to unpaid fines and fees.¹⁰ *Fowler* determined that property interests are created by the law,¹¹ and because there was not an indigent individual exception or alternative payment allowance for indigent individuals in the state law, there was no property interest to claim.¹²

Applying the cases above following *Fowler's* reasoning to a possible Texas case, the conclusion differs to that of *Fowler*. A Texas plaintiff does not have the property interest that the plaintiffs in *Fowler* were claiming.¹³ Texas plaintiffs would have a property interest under *Bell* and *Memphis Light* analysis of the Texas law,¹⁴ requiring a hearing to determine if plaintiff has the ability to pay the fine. *Roth's* application under *Fowler's* analysis would create a property interest for those who are unable to pay their court fines to have a hearing and have their fine lowered, waived, or changed to community service. Therefore, under *Fowler*, Texas law creates a property interest for those who are not able to pay to have a hearing and their fines changed under the options listed in Texas law.¹⁵

⁹ See *id.* at 14 (stating "As a threshold matter we must acknowledge that Plaintiffs do not claim merely a general property interest in a driver's license; their specific claim is to a property interest, as indigent individuals, in maintaining their driver's licenses when state law requires they be suspended due to unpaid court debt.")

¹⁰ See *id.*

¹¹ See *id.* at 13. (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) "Property interests, of course, are not created by the Constitution. Rather they are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlements to those benefits.")

¹² See *id.* at 10 (stating "... we must ask whether state law establishes the entitlement that Plaintiffs' claim in this case—a right of the indigent, who cannot pay court debt, to be exempt from driver's-license suspension on the basis of unpaid court debt. The answer is it has not.")

¹³ See *id.* at 14 (discussing that indigent individuals have no property interest maintaining their driver's license when state law requires suspension due to unpaid fines or court costs).

¹⁴ See Tex. Code of Crim. Proc. Ann. Art. 45.041

¹⁵ See *id.*

Conclusion

Fowler, if applied to a Texas case would not, on *Fowler's* reasoning alone, find that indigent individuals have no property interest maintaining their driver's license when there are unpaid court costs. *Fowler* concluded that property interests are created by laws. The law at issue in *Fowler* was a Michigan state law with no process addressing indigent individuals.¹⁶ Therefore, under *Fowler*, there was no property interest. Texas, however, does have laws that waive fees or provide options for indigent individuals.¹⁷ *Fowler* states that there would be a property interest if state law had an indigency exception, and that this would be a due process issue.¹⁸ Texas does not have an exception, but it does have procedures that provide options for the court to apply when fining indigent individuals.¹⁹ *Fowler* alone would not be enough to strike down this type of property interest if applied in a Texas matter. *Fowler's* application would limit the interest to requiring a pre-suspension hearing or proceeding. There, the judge would determine if the individual was unable to pay the court costs and then proceed to the options enumerated in Tex. Code of Crim. Proc. Ann. Art. 45.041.

¹⁶ See M.C.L.A § 257.321a

¹⁷ See Tex. Code Crim. Proc. Art. 45.0491

¹⁸ See *Fowler v. Benson*, Nos. 17-2504/18-1089, 2019 U.S. App. LEXIS 13747 at 19-20 (6th Cir. May 8, 2019) (stating “Of course, if Michigan law did have an indigency exception—for instance, [*20] if Michigan law prohibited the Secretary from suspending the driver's license of an indigent person—this case would look very different. Under that scenario, a suspension procedure that wholly failed to consider a person's indigency would violate due process. But that is not the case before us.”)

¹⁹ See Tex. Code Crim. Proc. Art. 45.0491

Applicant Details

First Name **Sarah**
 Middle Initial **B**
 Last Name **Dixon-Morgan**
 Citizenship Status **U. S. Citizen**
 Email Address sdixonmorgan@albanylaw.edu

Address	Address Street 152 Dove St City Albany State/Territory New York Zip 12202 Country United States
---------	--

Contact Phone Number **8657192150**

Applicant Education

BA/BS From **Middle Tennessee State University**
 Date of BA/BS **May 2019**
 JD/LLB From **Albany Law School**
<http://www.albanylaw.edu/>
 Date of JD/LLB **May 21, 2022**
 Class Rank **50%**
 Law Review/Journal **Yes**
 Journal(s) **Albany Government Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Anthony V. Cardona '70 Moot Court Program**
Domenick L. Gabrielli Appellate Advocacy Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **Yes**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Recommenders

Johnson, Pamela
pamela.johnson@tn.gov
8655940311
Trinidad, Marla
mtrinidad@legaloutreach.org
Queenan, Rosemary
RQueen@albanylaw.edu
518-445-3394

References

1) Ryan Korstange
615-898-5558
Professor, Honors Thesis Advisor
Ryan.Korstange@mtsu.edu
Middle Tennessee State University

2) Jonathan Allen
615-546-6969
Former Supervisor
Store Manager
Walmart Neighborhood Market Store #5182
Murfreesboro, TN

3) Alexandra Harrington

518-330-2201

aharr@albanylaw.edu

Professor

Albany Law School

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sarah Dixon-Morgan
(865) 719-2150 | sdixonmorgan@albanylaw.edu

June 27, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III and
Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am writing to express my enthusiastic interest in the law clerk position with Judge Hanes at the United States District Court for the Eastern District of Virginia. My dedication to serving people, work experience, and writing experience will help me be successful as a law clerk for Judge Hanes.

As an intern at the Tennessee Court of Workers' Compensation Claims, I learned that the judiciary is in the business of serving people. Drafting court documents, organizing court files, and contributing to the success of the office, I learned to work as part of a team and to complete projects with minimal supervision. Through my internship with The Honorable Zuberi Williams with the District Court of Maryland for Montgomery County, I have strengthened my legal writing and advocacy skills. I have prepared memoranda, counseled Judge Williams on judicial decisions, and worked with other interns to understand the judicial system and its impact on communities. My court experience will help me be successful as a clerk for Judge Hanes as I have strengthened and gained strong writing, organization, and attention-to-detail skills.

As a law intern with Albany Law School's Immigration Law Clinic, I worked directly with a client in the Migrant Protection Protocols program in Matamoros, Mexico. I prepared memoranda, briefs, and case documents as well as interviewed clients and worked with fellow counsel to help my client navigate the asylum process. Through my experience as an exchange student in Glasgow, Scotland, during undergraduate, I assimilated to a new environment and collaborated with individuals who came from vastly different journeys in life. These experiences have shaped my ability to interact with people who come from all walks of life, and I have learned to appreciate differences and similarities of the people around me. This will help me successful as a law clerk as it will allow me to understand individuals who come from a variety of backgrounds.

As a manager at Walmart, I learned that exceptional customer service is one of the most important skills. I led a team of diverse associates and fostered excellence in a retail setting. I created a "Cashier of the Month" program to boost morale and maintained effective and thorough communication between my team and the store's management. As a teaching fellow at Legal Outreach's Summer Law Institute, I taught rising high school freshmen about the criminal justice system. Working with educators and attorneys, I developed lesson plans, created learning activities, and implemented daily critical-thinking exercises to encourage comprehension. I managed daily virtual classrooms and implemented lessons about topics including the adversarial system of justice, Miranda warning, levels of intrusion, bail hearings, and theories of punishment. From these jobs, I learned how to facilitate positive interactions with colleagues, see the bigger picture when tasks seem mundane, and, in everything, see the humanity in everyone.

Through Albany Law's COVID-19 Response Corps, I worked with the Legal Aid Society in researching and writing a memorandum on new and material evidence and the five-day rule for Social Security benefits. In International Business Transactions, I completed legal research on corporate social responsibility in businesses operating in and around the European Union. Legal research on such diverse topics has taught me how to pivot between many subjects of the law and understand the connections between all areas of law.

Thank you so much for your time and consideration. It would be an honor to serve as a law clerk for Judge Hanes. I look forward to further discussing my qualifications.

Sincerely,
Sarah Dixon-Morgan

Sarah Dixon-Morgan

(865) 719-2150 | sbdixonmorgan@gmail.com

Education

Albany Law School of Union University (Albany, NY)

Juris Doctor Candidate, May 2022

Class Rank: Top 44% (Cumulative GPA: 3.27)

Awards: Dean's Scholarship; Colby Fellowship; Richard C. Johnson '51 Scholarship;
Dean's List (Spring 2021)

Activities: *Managing Editor for Research and Writing*, Government Law Review, Vol. 15
Student Assistant, Office of Institutional Advancement
Teaching Assistant, Criminal Law (Spring 2021)
Contributor, Albany Law School COVID Response Corps (Summer 2020)

Middle Tennessee State University (Murfreesboro, TN)

Bachelor of Science, *magna cum laude*, International Relations, May 2019

Study Abroad: Exchange Student, Glasgow Caledonian University (Glasgow, Scotland)

Thesis: *Learning from the Student's Perspective*,
<http://jewlscholar.mtsu.edu/xmlui/handle/mtsu/5752>

Experience

ABA Judicial Internship Opportunity Program (Washington, D.C.)

Law Clerk, Honorable Zuberi M. Williams June 2021 – Present
Draft Memorandum Orders on criminal, civil, domestic violence, traffic, and landlord/tenant cases.
Counseled judge and drafted judicial recommendations on motions. Conducted extensive legal research on contract, criminal, civil, domestic violence, and real property cases.

Immigration Law Clinic (Albany, NY)

Legal Intern January 2021 – May 2021
Researched, maintained, and represented cases involving immigrants in the Migration Protection Protocol Program. Interviewed and counseled clients. Drafted court documents, briefs, and memoranda.

Legal Outreach (New York, NY)

Legal Teaching Fellow, Summer Law Institute June 2020 – August 2020
Created and implemented lesson plans on criminal law and criminal trial procedure for rising ninth-grade students. Designed learning tools and weekly reviews to engage and encourage legal material retention. Led students in a virtual mock criminal trial.

Tennessee Court of Workers' Compensation Claims (Knoxville, TN)

Intern, Honorable Pamela B. Johnson January 2016 – May 2016
Created, indexed, and maintained court files. Drafted court orders. Drafted scripts for show cause hearings, status conferences, and motion hearings. Operated court room recording equipment. Assisted paralegal in maintaining case files.

Employment

Two Together (Albany, NY)

Program Site Coordinator, Tutor January 2020 – May 2021
Taught K-6 students reading skills and comprehension. Designed strategies to recruit and tutor students. Wrote monthly program reports for Two Together Board of Directors. Planned, organized, and implemented daily lessons. Facilitated community engagement and partnership with youth organizations.

Walmart Neighborhood Market (Murfreesboro, TN)

Customer Service Manager, Self-Check Out Host, Pharmacy Technician January 2018 – July 2019
Dispensed, audited, and returned register tills. Supervised cashiers, self-check-out hosts, and money center cashiers. Communicated with upper management regarding front end expectations, goals, and progress. Created Associate-of-the-Month program to foster associate appreciation and boost morale.

DIXON-MORGAN, SARAH B.

TRANSCRIPT OF RECORD

ALBANY LAW SCHOOL

ISSUED: 06/08/2021

STUDENT#: 0581365-1229

80 New Scotland Avenue, Albany, NY 12208
Telephone: 518-445-2335 Fax: 518-445-3323

MATRICULATED: 08/19/2019 PROGRAM: JD 3 Year ANTICIPATED DEGREE DATE: 05/22

TERM / COURSE INFORMATION	CR. HR.	GRADE	QPTS	TERM / COURSE INFORMATION	CR. HR.	GRADE	QPTS
FALL 2019 (08/19/2019 to 12/18/2019)				Averaged: 12.00 Earned: 14.00 Q.Pts: 46.20			
CONX CCHUN Contracts	3.0	B	9.0	SEM: GPA 3.85 Rank 34/164 CUM: GPA 3.27 Rank 73/165			
CIVP RQUEE Federal Civil Procedure	4.0	A	16.0				
ILWF LJIM2 Introduction to Lawyering	3.0	A	12.0	TOTALS Averaged: 59.00 Earned: 61.00 Q.Pts: 192.80			
PRP1 PHALE Property I	2.0	B+	6.6	Satisfied Upperclass Writing Requirement			
TORT RHEVE Torts	4.0	B+	13.2				
Averaged: 16.00 Earned: 16.00 Q.Pts: 56.80				STUDENT IN GOOD STANDING UNLESS OTHERWISE INDICATED			
SEM: GPA 3.55 Rank 28/174 CUM: GPA 3.55 Rank 28/174				NOT VALID AS OFFICIAL WITHOUT SIGNATURE AND SEAL			
SPRING 2020 (01/13/2020 to 05/13/2020)				*****END OF TRANSCRIPT RECORD*****			
Due to COVID-19, all grades are reported as Pass/No Credit with students given the option of electing the letter grade earned.							
Due to COVID-19, no JD students were ranked after spring grades.							
CNSL VBONV Constitutional Law	4.0	B	12.0				
CONT CCHUN Contracts	2.0	B	6.0				
CRIM CSUND Criminal Law	3.0	A	12.0				
ILWS LJIM2 Introduction to Lawyering	3.0	B+	9.9				
PRPT PREYH Property	4.0	B-	10.8				
Averaged: 16.00 Earned: 16.00 Q.Pts: 50.70							
SEM: GPA 3.17 CUM: GPA 3.36							
FALL 2020 (08/24/2020 to 12/21/2020)							
FIRS VBONV Con Law II: First Amendment	2.0	C	4.0				
EVDC CSUND Evidence	4.0	B	12.0				
IMMG MARMS Immigration Law	3.0	C-	5.1				
HMRT AHARR International Human Rights Law	3.0	B+	9.9				
TRES IBLOO Trusts and Estates	3.0	B-	8.1				
Averaged: 15.00 Earned: 15.00 Q.Pts: 39.10							
SEM: GPA 2.61 Rank 158/169 CUM: GPA 3.12 Rank 85/170							
SPRING 2021 (01/25/2021 to 05/19/2021)							
DEAN'S LIST							
GLWT AAYER Albany Govt Law Revw (writing)	1.0	CR				
CLIN SROGE CLN - Immigration Law Clinic	6.0	A	24.0				
CPIN CSUND Criminal Procedure:Investigtn	3.0	A-	11.1				
GLME AAYER Govt Law Review:Members	1.0	CR				
IBTR AHARR International Business Trans.	3.0	A-	11.1				

NOT VALID AS OFFICIAL WITHOUT SIGNATURE AND SEAL

DIXON-MORGAN, SARAH B.

**TRANSCRIPT OF RECORD
ALBANY LAW SCHOOL**

ISSUED: 06/08/2021

STUDENT#: 0581365-1229

80 New Scotland Avenue, Albany, NY 12208
Telephone: 518-445-2335 Fax: 518-445-3323

MATRICULATED: 08/19/2019 PROGRAM: JD 3 Year ANTICIPATED DEGREE DATE: 05/22

TERM / COURSE INFORMATION

CR. HR. GRADE QPTS

TERM / COURSE INFORMATION

CR. HR. GRADE QPTS

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ALBANY LAW SCHOOL

GRADING SYSTEM:

A+ = 4.3	C = 2.0	CR = Credit	Passing grade = D-, Effective with Class of 2021 ~ passing grade = C- in all required courses
A = 4.0	C- = 1.7	P = Pass	Required weighted average for graduation prior to 2001 = 1.70
A- = 3.7	D+ = 1.3	F = Failure	First year required cumulative average Fall 2009-2010 = 1.85
B+ = 3.3	D = 1.0	IN = Incomplete	First year required cumulative average effective Fall 2011-2.00
B = 3.0	D- = 0.7	AU = Audit	Effective 1998 Fall Term: Upperclass required semester average = 2.0.
B- = 2.7	F = 0.0	W = Withdrawn	Graduating class of 2001-2011, students must maintain a cumulative average of 2.0 to obtain J.D. degree.
C+ = 2.3	WF = 0.0	NC = No Credit	Graduation class of 2012 and on, students maintain a cumulative average of 2.25 to obtain J.D. degree.
			WF = Grade indicates failure to take exam and failure to withdraw from course

Ranking (revised 99/fall): Current ranks are issued to 3-year and joint-degree students attempting 10 credits in the semester, 2013 forward, 9 credits, and 4-year students attempting 8 credits. All students seeking their degree from Albany Law School receive cumulative ranks at the end of each fall and spring semester. (Jan 2017) Accelerated JD's are ranked every 3 semesters. Spring 2020 Students not ranked due to COVID-19.

Academic Probation and Dismissal:

2009-2011: Students will not be academically dismissed at the end of their first semester. A student who fails to achieve a cumulative grade point average of 1.85 at the end of the second full- or part-time semester of study shall be dismissed. A student whose cumulative grade point average at the end of the second full- or part-time semester, or any subsequent regular semester, is less than 2.0 shall be on academic probation for the next regular semester. At the end of the next regular semester, a student whose cumulative grade point average remains below a 2.00 shall be dismissed. Academic probation will be noted on the academic transcript.

2012-2014: Students will not be academically dismissed at the end of their first semester. A student who fails to achieve a cumulative grade point average of 2.00 at the end of the second full- or part-time semester of study shall be dismissed. A student whose cumulative grade point average at the end of the second full- or part-time semester, or any subsequent regular semester, is less than 2.25 shall be on academic probation for the next regular semester. At the end of the next regular semester, a student whose cumulative grade point average remains below a 2.25 shall be dismissed. Academic probation will be noted on the academic transcript.

2015-2018: A student who fails to achieve a cumulative grade point average of 1.00 at the end of the first full- or part-time semester shall be dismissed. A student who fails to achieve a cumulative grade point average of 2.00 at the end of the second full- or part-time semester of study shall be dismissed. A student whose cumulative grade point average at the end of the second full- or part-time semester, or any subsequent regular semester, is less than 2.25 shall be on academic probation for the next regular semester. Academic probation will be noted on the academic transcript.

2016-2018: First year students can use summer enrollment in first year courses to reach required 2.0 GPA.

2018 - : A student who fails to achieve a cumulative grade point average of 1.50 at the end of the first full- or part-time semester shall be dismissed. A student who fails to achieve a cumulative grade point average of 2.00 at the end of the second full- or part-time semester of study shall be dismissed. A student whose cumulative grade point average at the end of the second full- or part-time semester, or any subsequent regular semester, is less than 2.25 shall be on academic probation for the next regular semester. Academic probation will be noted on the academic transcript.

Spring 2020: No student will be academically dismissed due to COVID-19. 1L students must have a 2.0 by close of Fall 20 or be dismissed, & students have an additional regular semester to achieve 2.25 cumulative GPA before being placed on academic probation.

Readmission: Students who have been approved for readmission after academic dismissal had extraordinary and compelling circumstances and abided by our strict standards to be readmitted.

Pass/Fail Credits: Of the 87 credits required for graduation, four elective credits may be taken pass/fail. A pass entitles the student to credit, but the student's grade point average is unaffected. A failing grade is, however, weighted in the student's average. Between 2008-2013, there was no elective pass/fail option. Effective January 2013, the pass/fail option was reinstated. Only four elective credits may be taken pass/fail and a passing grade must be a "C" or better. Spring 2020 only: P = D- or higher.

Failures and Repeat Grades: A student who fails any required course will not be eligible for graduation without retaking and passing the course. A student who has failed an elective course need not retake the course, but if credit is sought, the course must be retaken and passed. Grades in retaken courses will be included in the computation of the student's semester and cumulative averages, and the new grade will appear on the transcript. A student will receive credit for the successful retaking of a failed course. 7/1/2018 Both grades in retaken courses will be included on transcript but only the higher grade will be included in the computation of the student's semester and cumulative averages. Students can retake a required failed course or an upper division course that covers and reinforces the same subject matter.

Dean's List: After the first year, a student in residence may achieve Dean's List by obtaining a semester grade-point average of 3.40 or above.

Skills Notation: Indicates that the student has performed the referenced skill to the satisfaction of a faculty member at a level of proficiency appropriate for a law student. Effective with the class of 2008 and thereafter, students must fulfill this requirement by taking one course offering substantial skill instruction from a list of courses. Class of 2017, 2 courses are required, 1 from a clinic. Class of 2018, both courses must equal 6 credits.

Concentrations: An indicated concentration means that the student has taken requisite core and related courses in the field, maintained a 2.70 or better average in those courses, and fulfilled additional requirements set by the faculty. Concentration with Honors indicates that the student earned the designated concentration and maintained a 3.50 average in concentration courses.

Upperclass Writing Requirement: As a requirement for graduation, a student must produce a substantial legal research paper.

Albany Law School is accredited by the American Bar Association and a member of the Association of American Law Schools.

In accordance with The Family Educational Rights and Privacy Act of 1974, you are hereby notified that this information is provided upon the condition that you, your agents, or employees will not permit any other party access to this record without consent of the student.

5/2020

Academic Transcript

 This is not an official transcript. Courses which are in progress may also be included on this transcript.

Special grades to note are:

FA = Failure and stopped attending

T_ = Transfer grades with leading "T" are not calculated in the overall and overall combined GPAs, but do count in the lottery GPA. Leading "T" grades were started

Summer 2015 for new undergraduate transfer credits regardless of the term the course was completed.

X = Grade not submitted by course instructor and not used in calculating grade point average until final grade submitted by instructor

The repeat indicator column denoted by an "R" after the Quality Points column translates as follows:

E = Excluded from GPA and Earned Hours

A = Included in GPA, but not Earned hours

I = Included in GPA and Earned Hours

F = Frozen and exempt from repeat processing (i.e., repeatable courses)

. = Excluded from GPA and Earned Hours – Academic Fresh Start

Note: Additional information about all grades and repeats are available in the University Catalog

[Click here to Print Unofficial Transcript \(Chrome and FireFox Only\)](#)

Transfer Credit Institution Credit Transcript Totals

Transcript Data

STUDENT INFORMATION

Student Type: Continuing

Curriculum Information

Current Program

Bachelor of Science

College:	Liberal Arts
Major and Department:	International Relations, Political Sci & Intl Relations
Minor:	Philosophy
Minor:	Journalism
Minor:	University Honors

***Transcript type:Advising-Unofficial Transcript is NOT Official ***

DEGREE AWARDED

Awarded: Bachelor of Science Degree Date: May 04, 2019

Institutional Honors: Magna Cum Laude

Curriculum Information

Primary Degree

8/1/2019

Academic Transcript

College:	Liberal Arts
Major:	International Relations
Minor:	Philosophy
Minor:	Journalism
Minor:	University Honors

TRANSFER CREDIT ACCEPTED BY INSTITUTION -Top-

Summer 2014:	Am College Test (ACT) Prog
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Subject	Course	Title		Grade	Credit Hours	Quality Points	GPA	
ENGL	1010	Expository Writing		TP	3.000	0.000		
ENGL	1020	Research and Arg Writing		TP	3.000	0.000		
		Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA	
Current Term:		6.000	6.000	6.000	0.000	0.000	0.000	

Unofficial Transcript

Spring 2014:	Adv Placement Program
---------------------	-----------------------

Subject	Course	Title		Grade	Credit Hours	Quality Points	R
PS	1005	Intro to American Politics		TP	3.000	0.000	
		Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:		3.000	3.000	3.000	0.000	0.000	0.000

Unofficial Transcript

Spring 2015:	Adv Placement Program
---------------------	-----------------------

Subject	Course	Title		Grade	Credit Hours	Quality Points	R	
CHEM	1110	General Chemistry I		TP	4.000	0.000		
CHEM	1120	General Chemistry II		TP	4.000	0.000		
HIST	2010	Survey United States Hist I		TP	3.000	0.000		
HIST	2020	Survey United States Hist II		TP	3.000	0.000		
		Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA	
Current Term:		14.000	14.000	14.000	0.000	0.000	0.000	

Unofficial Transcript

Spring 2016:	Adv Placement Program
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Subject	Course	Title	Grade	Credit Hours	Quality Points	R
HIST	1020	Survey Western	TP	3.000	0.000	

8/1/2019

Academic Transcript

		Civilization II					
		Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:		3.000	3.000	3.000	0.000	0.000	0.000

Unofficial Transcript

Fall 2017: Glasgow Caledonian University

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
PHIL	3340	Environmental Ethics	TA	3.000	0.000	
PHIL	4250	Philosophy of Gender	TB+	3.000	0.000	
PS	4260	Political Status of Women	TB+	2.000	0.000	
PS	4300	Comparative European Govt	TA	5.000	0.000	
PS	4850	Adv Studies Comp Politics	TA	2.000	0.000	

		Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:		15.000	15.000	15.000	0.000	0.000	0.000

Unofficial Transcript

INSTITUTION CREDIT -Top-

Term: Fall 2016**College:**

Liberal Arts

Major:

Political Science

Student Type:

New First Time Freshman

Academic Standing:

Good Standing

Additional Standing:

Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
MATH	1530	UG	Applied Statistics	A	3.000	12.000		
MUEN	3100	UG	The Band of Blue Marching Band	A	1.000	4.000		
PS	1010	UG	(HONORS) Introduction to Global Politics	A	3.000	12.000		
PSY	1410	UG	General Psychology	A	3.000	12.000		
SOC	1010	UG	Introductory Sociology	A	3.000	12.000		
UNIV	1010	UG	(HONORS) University Seminar	A	3.000	12.000		

Term Totals (Undergraduate)

		Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:		16.000	16.000	16.000	16.000	64.000	4.000
Cumulative:		16.000	16.000	16.000	16.000	64.000	4.000

Term: Spring 2017**College:**

Liberal Arts

Major:

International Relations

Student Type:

Continuing

8/1/2019

Academic Transcript

Academic Standing:			Good Standing						
Additional Standing:			Dean's List						
Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours	
COMM	2200	UG	(HONORS)Fundamentals of Communication	B+	3.000	9.990			
ENGL	2030	UG	(HONORS)The Experience of Literature	A	3.000	12.000			
PHIL	1030	UG	(HONORS)Introduction to Philosophy	A	3.000	12.000			
PS	2000	UG	Pol Sci & IR as Profession	A	1.000	4.000			
PS	3001	UG	Research Methods in PS	A	3.000	12.000			
PS	3220	UG	Comparative Politics	A	3.000	12.000			
Term Totals (Undergraduate)									
				Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:				16.000	16.000	16.000	16.000	61.990	3.874
Cumulative:				32.000	32.000	32.000	32.000	125.990	3.937
Term: Spring 2018									
College:			Liberal Arts						
Major:			International Relations						
Student Type:			Continuing						
Academic Standing:			Good Standing						
Additional Standing:			Dean's List						
Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours	
PHIL	3150	UG	Ethics	A	3.000	12.000			
PS	3210	UG	International Relations	A	3.000	12.000			
PS	3510	UG	Intl Political Economy	B+	3.000	9.990			
PS	4920	UG	Modern Political Theory	B	3.000	9.000			
SPAN	2010	UG	Intermediate Spanish I	A	3.000	12.000			
UH	3000	UG	University Honors Lecture Series: American Values	P	1.000	0.000			
UH	4900	UG	Honors Thesis Tutorial	P	1.000	0.000			
Term Totals (Undergraduate)									
				Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:				17.000	17.000	17.000	15.000	54.990	3.666
Cumulative:				49.000	49.000	49.000	47.000	180.980	3.851
Term: Summer 2018									
College:			Liberal Arts						
Major:			International Relations						
Student Type:			Continuing						
Academic Standing:			Good Standing						
Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours	

8/1/2019

Academic Transcript

JOUR	1020	UG	American Media and Social Inst	A	3.000	12.000		
PS	4240	UG	American Foreign Policy	A	3.000	12.000		
Term Totals (Undergraduate)								
				Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points
Current Term:				6.000	6.000	6.000	6.000	24.000
Cumulative:				55.000	55.000	55.000	53.000	204.980
Term: Fall 2018								
College:			Liberal Arts					
Major:			International Relations					
Student Type:			Continuing					
Academic Standing:			Good Standing					
Additional Standing:			Dean's List					
Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JOUR	2710	UG	Media Writing	A	3.000	12.000		
JOUR	2720	UG	Digital Media Skills	A	3.000	12.000		
PHIL	4010	UG	History Ancient Medieval Phil	A	3.000	12.000		
PS	2130	UG	(EXL) Model United Nations and Crisis Simulation	P	1.000	0.000		
PS	4801	UG	Senior Seminar in IR	A	3.000	12.000		
UH	4950	UG	Honors Independent Research	A	3.000	12.000		
Term Totals (Undergraduate)								
				Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points
Current Term:				16.000	16.000	16.000	15.000	60.000
Cumulative:				71.000	71.000	71.000	68.000	264.980
Term: Spring 2019								
College:			Liberal Arts					
Major:			International Relations					
Student Type:			Continuing					
Academic Standing:			Good Standing					
Additional Standing:			Dean's List					
Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JOUR	3530	UG	Feature Writing	A	3.000	12.000		
JOUR	4250	UG	Mass Media Law	B	3.000	9.000		
JOUR	4510	UG	Media History and Culture	A	3.000	12.000		
PS	3910	UG	International Organization	A	3.000	12.000		
Term Totals (Undergraduate)								
				Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points
Current Term:				12.000	12.000	12.000	12.000	45.000
Cumulative:				83.000	83.000	83.000	80.000	309.980

8/1/2019

Academic Transcript

Unofficial Transcript

TRANSCRIPT TOTALS (UNDERGRADUATE) -Top-**Level Comments:**

UNIVERSITY HONORS COLLEGE WITH DISTINCTION

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	83.000	83.000	83.000	80.000	309.980	3.875
Total Transfer:	41.000	41.000	41.000	0.000	0.000	0.000
Overall:	124.000	124.000	124.000	80.000	309.980	3.875

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Institution Combined:	83.000	83.000	83.000	80.000	309.980	3.875
Transfer Combined:	41.000	41.000	41.000	0.000	0.000	0.000
Overall Combined:	124.000	124.000	124.000	80.000	309.980	3.875

Unofficial Transcript

RELEASE: 8.7.1 PROD - SSBPROD2



STATE OF TENNESSEE
COURT OF WORKERS' COMPENSATION CLAIMS
520 West Summit Hill Drive, Suite 103, Knoxville, TN 37902
Phone (865) 594-5177 / Fax (865) 594-5172

June 30, 2021

Honorable Elizabeth W. Hanes
Spottswood W. Robinson III and
Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Re: Sarah Dixon-Morgan

Judge Hanes:

It is my distinct pleasure to recommend Sarah Dixon-Morgan for your consideration for a judicial clerkship. Ms. Dixon-Morgan served as a Summer Clerk for the Tennessee Court of Workers' Compensation Claims from January to May 2016. During that time, she exhibited several skills that would make her an asset to any legal organization.

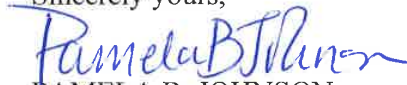
First, her ability to learn quickly and efficiently was particularly impressive. When she began her clerkship with us, she had no specialized knowledge of workers' compensation law or state administrative processes. Yet, she quickly became familiar with the Tennessee Workers' Compensation Act and the regulations governing mediation, litigation, and appeals of workers' compensation claims.

Second, Sarah worked with our paralegal to draft orders and organize court files. She exhibited strong writing and analytical skills. She helped in the courtroom by operating the recording equipment.

Finally, Sarah conducted herself in a highly professional manner, exhibiting a positive attitude and a thirst to learn. She worked well with other judges, mediators, and staff and was curious to understand the roles of each member of our organization in the mediation and litigation processes. Sarah is intelligent, articulate, and hard-working. Moreover, she is a considerate and thoughtful. I have no reservations in offering this recommendation.

Thank you for your consideration.

Sincerely yours,


PAMELA B. JOHNSON
Workers' Compensation Judge



36-14 35th Street
Long Island City, NY 11106
Tel (718) 752-0222 ext. 211
Fax (718) 752-0020
Web www.legaloutreach.org
Email mtrinidad@legaloutreach.org

June 29, 2021

To whom it may concern:

I would like to offer my highest recommendation for Sarah Dixon-Morgan to be selected for your clerkship. As the Law-Related Education Coordinator at Legal Outreach, I have been privileged to witness Sarah's work ethic benefit our organization in a number of ways over the past six months, and I am grateful that I can depend on her to work with us for the next six months.

When she interned with us during Summer 2020 as a Legal Teaching Fellow, she demonstrated strong writing skills and insightful analysis as she prepared lesson plans to teach rising ninth graders about criminal law and criminal justice. I was greatly appreciative of her flexibility as we transitioned our in-person program to one that was 100% virtual. Her co-Legal Teaching Fellow, undergraduate intern she supervised, and students she taught had only positive things to say about her collaboration and amazing ability to work well within a team. That positive feedback, doubled with her incredible initiative, led to her continuing to work with us during the 2020-21 academic year.

During the academic year, Legal Outreach's Sophomores, Juniors, and Seniors get to participate in two debate competitions focused on an issue based in Constitutional Law and/or social justice. As a Debate Coach, Sarah continues to demonstrate her passion for serving others by working with two students to help them not only complete their writing assignments, but also to strategize and prepare for their oral arguments.

Any Legal Outreach opportunity that is made available for law students to not only help others but also encourage professional development, Sarah seizes and goes above and beyond in its completion. Your courtroom can expect only great things from Sarah. Please consider hiring her. It will be one of the best decisions you have ever made.

Please contact me at (917) 512-3184 if you have any questions.

Sincerely,

Marla Trinidad

Marla Trinidad, Esq.

[date]

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to enthusiastically support Sarah Dixon-Morgan's application for a clerkship in your Chambers. Sarah is a very talented student and I believe she will distinguish herself as a very fine law clerk.

I first became acquainted with Sarah as a student in my Federal Civil Procedure course during her first year of law school. Sarah was always prepared for class and actively participated in class discussions about complicated procedural issues and cases. She often asked thoughtful questions, which demonstrated her strong analytical skills and proficiency with the class material. She earned an A in the course.

I have also had the opportunity to work closely with Sarah in her role as a Colby Wellness Fellow, a position that is held by two law students who have demonstrated a strong interest and commitment to well-being in law school. I selected Sarah to serve as a Colby Fellow because I was impressed by her professionalism, her work ethic and her strong commitment to serving others. As her supervisor, I have observed Sarah's strong communication skills, her commitment to excellence and her attention to detail. She is willing to go above and beyond when completing each task or assignment and often presents very thoughtful ideas. She is very well respected by her peers, members of the faculty and the administration.

Based on Sarah's strong intellect, work ethic, and communication skills, I am confident that she will be an excellent attorney and an outstanding clerk. If I can answer any questions about her candidacy, please contact me.

Very truly yours,

Rosemary Queenan
Associate Dean for Student Affairs
Professor of Law
rquee@albanylaw.edu

Rosemary Queenan - RQueen@albanylaw.edu - 518-445-3394

Sarah Dixon-Morgan
Writing Sample

Introductory Note: This writing sample is a portion of a memorandum completed for Albany Law’s COVID Response Corps and the Legal Aid Society of Northeastern New York. A “Statement of Facts” is not included due to confidentiality.

QUESTION PRESENTED

- I. The Appeals Council will review a case if there is new and material evidence that relates to the period on or before the date of the hearing decision and there is reasonable probability that the additional evidence would change the outcome of the decision. If evidence was created after the hearing but before the judicial decision, is it new?
- II. Medical evidence created after an ALJ’s decision cannot be found irrelevant solely due to timing. If medical records were created after the judicial decision, is it new?
- III. The Appeals Council only considers additional evidence if good cause exists for the claimant failing to submit evidence when claimant’s case was before the ALJ. Effective January 2017, claimant is required to submit evidence no later than five business days before the hearing. Does the Appeals Council treat the five-day rule the same as an ALJ?

DISCUSSION

- I. Evidence may be considered “new” if it was created after the judicial hearing or if it existed prior to the hearing but was not in the record.**

The Appeals Council will review a case if it “receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.” 20 C.F.R. §§ 404.970(a)(5); 416.1470(a)(5). Evidence is new when it “did not exist at the time of the ALJ’s hearing.” *Pollard v. Halter*, 377 F.3d 183, 193 (2d Cir. 2004); *see also* HALLEX I-3-3-6(B)(2) (“evidence is new if it is not part of the claim(s) file as of the date of the hearing decision”). It is material when it is “relevant to the claimant’s condition during the time period for which benefits were denied and probative.” *Pollard*, 377 F.3d at 193 (citations omitted). Materiality requires “a reasonable possibility that the new evidence would have

influenced the [ALJ] to decide [a] claimant's application differently." *Id.* (citations omitted).

The Appeals Council only considers additional evidence if good cause exists for the claimant not timely informing the Social Security Administration (SSA) about or submitting the evidence when the claimant's case was before the ALJ. 20 C.F.R. §§ 404.970(b); 416.1470(b). Good cause exists where an unexpected or unavoidable circumstance beyond a claimant's control prevented the claimant from informing the Social Security Administration about or submitting the evidence earlier. *Id.* at §§ 404.970(b)(3); 416.1470(b)(3).

When evidence did not exist at the time of the ALJ hearing, it can still be considered new evidence. In *Crosse v. Colvin*, the claimant sought review of the denial of disability insurance benefits by the Commissioner of the SSA. *Crosse*, 73 F. Supp. 3d 169, 170 (N.D.N.Y. 2014). After the ALJ's denial of benefits, the claimant submitted additional evidence from the treating physician that post-dated the hearing officer's decision to the Appeals Council, which also denied the claim. *Id.* In the Second Circuit, a remand is warranted if the plaintiff demonstrates that evidence is new, material, and there is good cause for failing to present the evidence earlier. *Id.* at 174 (citing 42 U.S.C. § 405(g); *Jones v. Sullivan*, 949 F.2d 57, 60 (2d Cir. 1991)). The treating physician did not sign the opinion submitted until after the administrative hearing, so the evidence could not have been submitted earlier. *Id.* Here, the court held that the claimant met the requirements because the evidence from the treating physician submitted after the hearing constituted "new" evidence, and, therefore, should have been considered. *Id.*

When evidence existed but was not submitted by the time of the ALJ's decision, it can still be considered new evidence. In *Shrack v. Astrue*, the claimant sought review of the denial of Social Security Disability Insurance (SSDI) benefits by the Commissioner of the Social Security Administration. *Shrack*, 608 F. Supp. 2d 297, 300 (D. Conn. 2009). The claimant submitted more

than three-hundred pages of additional evidence after the ALJ's decision, including notes and medical findings from the claimant's treating physician. *Id.* at 301. However, "under the regulations, the Appeals Council must consider new and material evidence if it relates to the period on or before the date of the administrative law judge hearing decision." *Id.* at 302 (citing *Perez v. Chater*, 77 F.3d 41, 45 (2d Cir. 1996); 20 C.F.R. §§ 404.970(b)). The court remanded the case and held that the SSA must consider "new and material evidence to the extent it relates to the period on or before the date of" the ALJ's decision. *Id.* "New evidence is any evidence that has not been considered previously during the administrative process." *Id.* (citing *DelValle v. Apfel*, 97 F. Supp. 2d 215, 222 (D. Conn. 1999)).

II. Medical evidence pre-dating and post-dating the judicial hearing may be found to be new and material evidence.

Medical evidence created after an ALJ's decision cannot be found irrelevant solely due to timing. *Newbury v. Astrue*, 321 F. App'x 16, 18 n. 2 (2d Cir. 2009) (citations omitted). As previously stated, "new evidence is any evidence that has not been considered previously during the administrative process." *McIntire v. Astrue*, 809 F. Supp. 2d 13, 21 (D. Conn. 2010) (citing *DelValle*, 97 F. Supp. 2d at 222).

In *McIntire*, the claimant sought review of the denial of disability insurance benefits. 809 F. Supp. 2d at 14. Though originally approved for disability, in September 2006, the ALJ found that the claimant's disability ceased due to medical improvements. *Id.* at 15. The claimant appealed this finding and submitted additional medical evidence from both before and after the judicial decision, including radiological reports and the treating physician's opinion. *Id.* Here, the court held that the radiological records, dated before the judicial decision, and treating physician's opinion, dated after the judicial decision, were "'new' to the Appeals Council," and, meeting the materiality and probative requirements, should have been considered. *Id.* at 22.

III. New and material evidence must be submitted at least five days before the hearing or with a showing of good cause for failing to submit the evidence within the required time.

The Appeals Council only considers additional evidence if good cause exists for the claimant not timely informing the Social Security Administration about or submitting the evidence when the claimant's case was before the ALJ. 20 C.F.R. §§ 404.970(b); 416.1470(b). Good cause exists where an unexpected or unavoidable circumstance beyond a claimant's control prevented them from submitting the evidence earlier. *Id.* at §§ 404.970(b)(3); 416.1470(b)(3). “[T]he Appeals Council will only consider additional evidence ... if you show good cause for not informing us about or submitting the evidence[,]’ at least five business days before the date of the claimant’s scheduled hearing, for particular enumerated reasons,” including the good cause exception. *Samantha D. v. Comm’r of Soc. Sec.*, 2020 WL 1163890, *4 (N.D.N.Y. 2020) (citing 20 C.F.R. §§ 404.970(b), 416.1470(b)). If the Appeals Council approves, the new and material evidence becomes part of the administrative record for judicial review. *Id.* at *4 (citing *Lesterhuis v. Colvin*, 805 F.3d 83, 87 (2d Cir. 2015)).

In *Samantha D.*, the claimant sought review of the ALJ’s and Appeals Council’s denial of disability benefits. 2020 WL 1163890, *1 (N.D.N.Y. 2020). The claimant submitted a statement from a treating physician after the regulations’ deadline, and this evidence was not considered by the ALJ or the Appeals Council. *Id.* at *7. Both the ALJ and the Appeals Council did not address whether the claimant had good cause for submitting the evidence after the deadline. *Id.* Here, the court held that the “Commissioner’s failure to address, in any fashion, the new, material information from the only treating physician to submit a medical source statement, was error which requires remand.” *Id.* The court remanded to determine whether the evidence in question could be considered under the regulatory exceptions to the five-day rule. *Id.* at *10.

Sarah Dixon-Morgan
Writing Sample

Introductory Note: This writing sample is a portion of an objective memorandum submitted for Introduction to Lawyering I. The “Questions Presented”, “Brief Answers”, and “Conclusion” are omitted for brevity. The professor did not require citations to the record in either the Statement of Facts or the Argument. The memorandum examined whether a mother and daughter could state a claim for negligent supervision against the daughter’s school.

STATEMENT OF FACTS

Regina George (“Regina”) and Cady Heron (“Cady”) attend North Shore High for the Performing Arts (“NSH”) in Albany, New York. Regina moved to NSH from East High School in Albuquerque, New Mexico, where she was involved in two fistfights due to jealousy. At NSH, Regina has no record of violence but has been cited six times for disruptive behavior.

Cady and Regina auditioned for the lead role in NSH’s musical Grease. Cady was cast as the lead; Regina was cast as a minor character. Regina told Cady to “quit, or you’ll be sorry” and threatened Cady might have “an accident” if she did not quit. Cady reported the threats to Mr. Miranda, the musical director, who told Cady to ignore Regina. Mr. Miranda did not believe Cady and thought she was a “drama queen.” On September 11, 2019, Cady’s mother saw Regina’s Facebook post that Regina would “take care” of Cady if she did not quit the musical. Cady’s mother contacted Principal Duvall. Principal Duvall met with Regina and Cady the next day and made Cady apologize for looking at Regina’s Facebook and made Regina promise not to bother Cady, threatening suspension if she engaged in any violence against Cady.

On September 13, Cady and Regina attended musical rehearsals after school. While the formal school day ends at 2:45 p.m., many students have extracurriculars until 5 p.m. NSH’s safety policy includes a fence surrounding the school with one exit leading to New Scotland

Avenue. Two security guards with radios are supposed to stand at the gate every day until a 5 p.m. school bus arrives. The security officers also secure the faculty parking lot across the street.

After rehearsals, Cady saw no security guards at the exit gate. Vivian Kensington, NSH's attorney, stated that the security guards were not at the gate due to a break-in at the faculty parking lot. As Cady exited the gate, Regina came up behind her and demanded that Cady quit the musical. When Cady asked Regina to leave her alone, Regina punched Cady. Cady fell, and Regina kicked Cady. The incident lasted no longer than two minutes. Gretchen Wieners saw the fight and told a teacher, Sharon Norbury, who called Cady's parents and drove her to the hospital. Cady could not participate in the musical.

ARGUMENT

The Herons' Claim Against NSH For Negligent Supervision Is Likely To Survive A CPLR 3211 Motion

A defendant may move to dismiss a cause of action “on the ground that . . . the pleading fails to state a cause of action.” N.Y. C.P.L.R. 3211(a)(7) (McKinney 2016). The court evaluating the motion “must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” McKenzie v. Meridian Capital Grp., LLC, 829 N.Y.S.2d 129, 130 (App. Div. 2006) (citations omitted).

Schools have “a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision.” Mirand v. City of New York, 637 N.E.2d 263, 266 (N.Y. 1994) (citations omitted). A “teacher owes it to his [or her] charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances.” Id. (citations omitted). But “[s]chools are not insurers of safety” and “cannot be reasonably expected to continuously supervise and control all

movements and activities of students.” Id. (citations omitted). Schools are not liable “for every thoughtless or careless act by which one pupil may injure another.” Id. (citations omitted).

NSH likely breached its duty of supervision because it was on notice of Regina’s violent disciplinary record and direct threats to Cady. NSH’s breach of its duty of supervision likely proximately caused Cady’s injuries because Cady’s injuries were foreseeable and NSH failed to comply with its security plan. Cady’s negligence claim is not precluded because the attack occurred shortly after Cady left the school and at a time when the school was still open. Thus, the Herons’ claim against NSH for negligent supervision is likely to survive a motion to dismiss.

I. The Court Is Likely To Conclude That NSH Breached Its Duty Of Supervision

To establish that a school breached its duty of adequate supervision where the injuries are caused by another student, the plaintiff must “establish that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury.” Mirand, 637 N.E.2d at 266. (citations omitted). There would not be sufficient notice if there is no proof of prior conduct that would put school officials on notice of an anticipated violent act. Id. (citations omitted). But even if there is a breach of the duty of supervision, the plaintiff must also show that the “negligence was the proximate cause of the injuries sustained.” Id.

An online post that one student will attack another does not permit a school to reasonably anticipate that an attack will occur unless the assailant wrote a post that directly threatens the victim. Conklin v. Saugerties Cent. Sch. Dist., 966 N.Y.S.2d 575, 577 (App. Div. 2013). In Conklin, a dad saw a social media post stating that a student (the assailant) wanted to fight the dad’s daughter (the victim). Id. at 576. The school met with the students the day after the dad reported the post. Id. At this meeting, the students “denied any intention” to fight. Id. Later that day, the assailant attacked the victim. Id. The court held that the school “could not have

reasonably anticipated” the attack because the assailant’s friend wrote the post, and thus, the post was rumor and not “a direct threat” by the assailant. Id. at 577.

Here, Regina posted on Facebook that she would “take care” of Cady if Cady did not quit Grease. Like Conklin, Cady’s mother told Principal Duvall. But unlike Conklin, Regina (the assailant) wrote the Facebook post, not her friend, and the post was a direct threat to Cady. Because NSH had actual notice of a direct threat, NSH could have anticipated Regina’s attack.

A school may breach its duty of supervision when “school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury.” Walley v. Bivins, 917 N.Y.S.2d 461, 462 (2011) (citations omitted). In Walley, the victim and the assailant had three prior incidents of violence. Id. After suspension, the assailant stabbed the victim. Id. For safety, the school required teachers to stand outside their classroom at the start of the school day, but teachers were not present when the incident occurred. Id. The court held that because the school had notice of an escalating relationship between the students and the safety policy was not followed, the school breached its duty of supervision. Id.

Here, Regina’s disciplinary record included two fights due to jealousy. Principal Duvall knew Regina threatened Cady on Facebook. Like Walley, NSH had notice of an escalating conflict between Regina and Cady. Further, NSH’s safety policy was to have security officers at the exit from the school to the street until the 5 p.m. school bus arrived. Like Walley, NSH failed to comply with its safety policy. Because NSH knew of an escalating conflict and failed to follow its safety policy, the court will likely find that NSH breached its duty of supervision.

Because NSH had notice of Regina’s violent history and failed to follow its safety measures, the court will likely find that NSH breached its duty of supervision.

II. Assuming That NSH Breached Its Duty Of Supervision, The Court Is Likely To Conclude That The Breach Was The Proximate Cause Of Cady’s Injuries

If a school breached its duty of supervision, the plaintiff must show that the “negligence was the proximate cause of the injuries sustained.” Mirand, 637 N.E.2d at 266. A school’s negligence may not be proximate cause if the wrongful conduct of a student is “extraordinary and intervening,” thus breaking the causal nexus between the school’s negligence and the student’s injury. Id. To determine causal nexus, courts ask “whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school’s negligence.” Id. (citations omitted).

A school’s failure to comply with its security plan may proximately cause a victim’s injuries if the injuries were foreseeable. Walley, 917 N.Y.S.2d at 463. In Walley, the victim had been in three prior fights with the assailant. Id. The school failed to comply with its security policy to have teachers stand outside their classrooms when the attack occurred. Id. The court held that the school’s breach of its duty of supervision in not complying with its security policy proximately caused the victim’s foreseeable injuries. Id.

Here, security guards were not at NSH’s gate when Regina attacked Cady. Like Walley, NSH failed to comply with its security plan despite its knowledge of potential violence between Regina and Cady. Regina’s attack against Cady was foreseeable because Regina directly threatened Cady. Because NSH failed to comply with its security plan and the attack was foreseeable, NSH’s breach of its duty of supervision likely proximately caused Cady’s injuries.

A school’s breach of duty of supervision may not proximately cause a student’s injuries if the attack was “so sudden and spontaneous” that supervision could not prevent it. MacCormack, 856 N.Y.S.2d at 724 (citations omitted). In MacCormack, the school was not on notice of the assailant’s violent propensities because his disciplinary record did not include violence. Id. at

723. The court held if the school had breached its duty of supervision, the breach would not have proximately caused the victim's injuries because the attack was sudden. Id. at 724.

Here, Regina's violent disciplinary record made the attack foreseeable. Unlike MacCormack, the attack was preventable by supervision because Regina's disciplinary record included incidents of violence. Because the attack was preventable and not sudden, NSH's breach of duty likely proximately caused Cady's injuries.

When a school breached its duty of supervision, "the complete absence of security" may proximately cause a student's injuries. Mirand, 637 N.E.2d at 267. In Mirand, the assailant threatened to kill the victim. Id. at 264. The victim sought help from the security office at her school, but no security officer was present that day. Id. at 265. As the victim tried to leave the school at dismissal, the victim was hit with a hammer by the assailant. Id. The court held that the school's complete absence of security at a time when "the largest number of students congregate" proximately caused the victim's injuries. Id. at 267.

Here, NSH's security officers were not at the gate because of a break-in at the faculty parking lot. Like Mirand, there were no security officers present when Regina attacked Cady. Because there were no security officers present, NSH's breach of its duty of supervision likely proximately caused Cady's injuries.

Because NSH failed to comply with its security plan and no security officers were present at dismissal and Cady's injuries were foreseeable and preventable, NSH's breach of its duty of supervision likely proximately caused Cady's injuries.

Applicant Details

First Name **Caitlin**
 Last Name **Doak**
 Citizenship Status **U. S. Citizen**
 Email Address cmdoak@asu.edu
 Address

Address
Street 5615 N. Palacio Way City Phoenix State/Territory Arizona Zip 85014 Country United States

Contact Phone Number **6306328149**

Applicant Education

BA/BS From **Dickinson College**
 Date of BA/BS **May 2016**
 JD/LLB From **Arizona State University College of Law**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=80302&yr=2011
 Date of JD/LLB **May 12, 2021**
 Class Rank **5%**
 Law Review/Journal **Yes**
 Journal(s) **Arizona State Law Journal**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Willem C. Vis International Commercial Arbitration Moot**

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **Yes**
Externships
Post-graduate
Judicial Law **Yes**
Clerk

Specialized Work Experience

Recommenders

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References

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Barry A. Willits
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

CAITLIN M. DOAK

5615 N. Palacio Way, Phoenix, AZ 85014
Email: cmdoak@asu.edu – Phone: (630) 632-8149

June 4, 2021

Chambers of the Honorable Magistrate Judge Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr. Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am writing to apply for a clerkship with your chambers during the 2022–2024 term. I graduated *magna cum laude* from the Sandra Day O'Connor College of Law at Arizona State University and was most recently ranked sixth in my class. I am very much looking forward to clerking for the Honorable Chief Justice Robert M. Brutinel at the Arizona Supreme Court during the 2021–2022 term. But my externship with the Honorable Judge Douglas L. Rayes at the United States District Court for the District of Arizona has cemented my desire to clerk at a federal court, as well. I am excited about the opportunity to continue learning and honing my skills with your guidance.

I believe that my grit, adaptability, and curiosity will allow me to contribute to your chambers. I am an avid hiker, and, particularly during this last year, I have relied often on the skills and practices gleaned from my time on the trail. During my thru-hike on the Appalachian Trail, I had to adapt to constantly changing circumstances—a detailed plan only goes so far when weather and water availability are unpredictable. Despite the long days, I never tired of thinking about legal protections for wild spaces. This experience is part of what inspired me to go to law school, and my curiosity for the law expanded to nearly every area of law I encountered.

During the pandemic, I have strived to apply my hiking experiences and get the most out of my legal education. Like on the trail, I have persevered and adapted to virtual classes and externships and even virtual international moot court. And I have made it my goal to use this unique time as a chance to acquire new skills through a diverse set of experiences, including working at small and large firms, a federal court, and an administrative appeals board. As your clerk, I would apply this flexibility and my natural curiosity to continue learning and improving as a legal writer and thinker.

Letters of recommendation will follow from Professors Karen Bradshaw and Andrew Carter. Please let me know if I can provide any other information. Thank you for your time and consideration.

Respectfully,



Caitlin Doak

CAITLIN M. DOAK

5615 N. Palacio Way, Phoenix, AZ 85014
Email: cmdoak@asu.edu – Phone: (630) 632-8149

EDUCATION

Sandra Day O'Connor College of Law, Arizona State University Phoenix, AZ
Juris Doctor | *magna cum laude* | May 2021 | Certificate in Law and Sustainability
GPA: 3.94 | Class Rank as of January 2021: 6/259 (top 3%)

Honors: Order of the Coif | Order of the Barristers | Dean's Award | High Pro Bono Distinction | Joseph Feller Memorial Fellowship | Willard H. Pedrick Scholar | O'Connor Honors Fellow | CALI Awards: Legal Method and Writing; Federal Indian Law II; Wilderness Law and Policy

Activities: Associate Editor, *Arizona State Law Journal* | Team Member, Willem C. Vis International Commercial Arbitration Moot, 2020–2021 | Research Assistant, Professor Karen Bradshaw, 2020–2021 | Research Assistant, Professor Bijal Shah, Summer 2020 | Teaching Assistant, Civil Procedure, Professor Bob Dauber, Fall 2019 | Teaching Assistant, Legal Analysis, Professor Charles Calleros, Spring 2020 & Spring 2021 | Law Student Tutor, Academic Success Program | Volunteer, Arizona Legal Center | Student Representative, Maricopa County Bar Association Editorial Board

Dickinson College Carlisle, PA

B.A. with Honors in Philosophy | *magna cum laude* | May 2016

Minors: Environmental Studies, Women's and Gender Studies

Honors: Phi Beta Kappa | Alpha Lambda Delta | John Montgomery Scholar | Baird Sustainability Fellow | The George Allan Prize in Philosophy

Activities: Intern, Center for Sustainability Education | Teaching Assistant, Environmental Science | Participant, International Service Trip (Cameroon) | President, Environmental Club

Study Abroad: Danish Institute for Study Abroad, Copenhagen, Denmark, 2014–2015

EXPERIENCE

Arizona Supreme Court Phoenix, AZ
Law Clerk for the Honorable Chief Justice Robert M. Brutinel, 2021–2022 term

Environmental Appeals Board, U.S. Environmental Protection Agency Remote
Legal Extern, January 2021–March 2021

- Conducted legal research and writing to assist Environmental Appeals Judges and Counsel to the Board in preparing final decisions on administrative appeals.

Taylor & Gomez LLP Phoenix, AZ
Law Clerk, August 2020–November 2020

- Drafted disclosure statements and demand letters; researched medical and legal issues for civil litigation case preparation in medical malpractice, personal injury, and civil rights cases.

Lewis Roca Rothgerber Christie LLP Phoenix, AZ
Summer Associate, June 2020–July 2020

- Wrote research memoranda on topics including asylum and consumer protection.

United States District Court for the District of Arizona Phoenix, AZ
Judicial Extern for Judge Douglas L. Rayes, January 2020–April 2020

- Drafted written orders on motions for summary judgment on issues including an administrative appeal of a decision by the Office of Navajo and Hopi Indian Relocation; observed court proceedings.

Holden Willits, PLC Phoenix, AZ
Law Clerk, May 2019–December 2019

- Researched and analyzed case law and treatises regarding construction law, such as material breaches of a contract and the resulting damages, for the purpose of writing informative memoranda.

Law Offices of David K. Barhydt Oak Brook, IL
Legal Assistant, January 2017–June 2018

- Managed up to fifty cases at various stages of litigation; drafted and edited motions and legal notices.

INTERESTS

Long-distance backpacking (Appalachian Trail, Colorado Trail), marathon running, rock climbing, escape rooms.

Arizona State University

Unofficial Transcript

Page 1 of 1

Name: Caitlin M Doak
Student ID: 1214847985

Print Date:	06/01/2021	Term GPA:	3.87	Term Totals	13.000	13.000	30.999
External Degrees		Cum GPA:	3.90	Cum Totals	60.000	60.000	194.994
Dickinson College							
Bachelor of Arts	05/01/2016						
Beginning of Law Record							
2018 Fall							
<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>		
LAW 515	Contracts	4.000	4.000	A	16.000		
LAW 517	Torts	4.000	4.000	A	16.000		
LAW 518	Civil Procedure	4.000	4.000	A	16.000		
LAW 519	Legal Method and Writing	3.000	3.000	A+	12.999		
Term GPA:	4.07	Term Totals	15.000		60.999		
Cum GPA:	4.07	Cum Totals	15.000		60.999		
2019 Spring							
<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>		
LAW 516	Criminal Law	3.000	3.000	A	12.000		
LAW 522	Constitutional Law I	3.000	3.000	B+	9.999		
LAW 523	Property	4.000	4.000	A	16.000		
LAW 524	Legal Advocacy	2.000	2.000	A	8.000		
LAW 638	Professional Responsibility	3.000	3.000	B+	9.999		
Term GPA:	3.73	Term Totals	15.000		55.998		
Cum GPA:	3.90	Cum Totals	30.000		116.997		
2019 Fall							
<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>		
LAW 609	Administrative Law	3.000	3.000	A+	12.999		
LAW 613	Federal Courts	3.000	3.000	B+	9.999		
LAW 657	Private Property Rights	3.000	3.000	A	12.000		
LAW 735	Teaching Assistant	2.000	2.000	P	0.000		
LAW 770	Law Journal	3.000	3.000	A	12.000		
LAW 785	Externship	3.000	3.000	P	0.000		
Term GPA:	3.92	Term Totals	17.000		46.998		
Cum GPA:	3.90	Cum Totals	47.000		163.995		
2020 Spring							
<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>		
LAW 605	Evidence	3.000	3.000	A	12.000		
LAW 691	Seminar	2.000	2.000	B	6.000		
Course Topic:	Animal Law						
LAW 704	Federal Indian Law II	3.000	3.000	A+	12.999		
LAW 735	Teaching Assistant	2.000	2.000	P	0.000		
LAW 785	Externship	3.000	3.000	P	0.000		
2020 Summer							
<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>		
LAW 691	Seminar	2.000	2.000	A+	8.666		
Course Topic:	Wilderness Law and Policy						
Term GPA:	4.33	Term Totals	2.000		8.666		
Cum GPA:	3.92	Cum Totals	62.000		203.660		
2020 Fall							
<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>		
LAW 619	Energy Law & Policy	3.000	3.000	A	12.000		
LAW 632	Federal Indian Law I	3.000	3.000	A+	12.999		
LAW 639	Natural Resource Law	3.000	3.000	A	12.000		
LAW 781	Independent Study	3.000	3.000	A	12.000		
LAW 791	Seminar	1.000	1.000	P	0.000		
Course Topic:	Feminist Judgments						
LAW 791	Seminar	1.000	1.000	A	4.000		
Course Topic:	Moot Court Teams						
Term GPA:	4.08	Term Totals	14.000		52.999		
Cum GPA:	3.95	Cum Totals	76.000		256.659		
2021 Spring							
<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>		
LAW 604	Criminal Procedure	3.000	3.000	A+	12.999		
LAW 654	Business Organizations	3.000	3.000	B+	9.999		
LAW 687	Civil Pretrial Practice	2.000	2.000	P	0.000		
LAW 735	Teaching Assistant	2.000	2.000	P	0.000		
LAW 785	Externship	3.000	3.000	P	0.000		
Term GPA:	3.83	Term Totals	13.000		22.998		
Cum GPA:	3.94	Cum Totals	89.000		279.657		
END OF TRANSCRIPT							



June 7, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Applicant Caitlin Doak

Dear Judge Hanes:

It is with pleasure that I recommend Caitlin Doak for a judicial clerkship in your chambers. I know Ms. Doak well. She was the top student in my Wilderness Law & Policy course, and I am currently supervising her independent work that argues for sensible reform of the Federal Energy Regulatory Commission's permitting process for natural gas pipelines. Ms. Doak is an excellent writer, and she approaches thorny issues of law with an even-handed analytical rigor. I believe she will do excellent work in chambers.

In my Wilderness Law and Policy course, Ms. Doak was easily my finest student. Yes, she demonstrated a firm command of the complex statutory and administrative law that governs America's still wild public lands. But what impressed me the most was her appreciation for procedural fairness and her grasp of the competing philosophical traditions that underlie the often-pitched battles over how to use America's public lands. Ms. Doak understands that for lawyers to resolve conflicts in the political arena they must be able to identify the value systems that motivate all sides. And she understands that courts must resolve conflicts based on law, facts, and procedural fairness, not based on one's preferred outcome.

After her performance in my Wilderness course, I was delighted when Ms. Doak asked me to supervise her independent study of the FERC permitting process. Ms. Doak became interested in the issue after the Supreme Court's decision last year in *USFS v. Cowpasture River Preservation Association*, a decision that greenlighted a natural gas pipeline that would have crossed the Appalachian Trail. Because of the Appalachian Trail connection, the *Cowpasture* decision garnered some national attention. What was less noticed is that after the Supreme Court decision, the pipeline's promoters, despite their victory, quietly shut the project down. This is where Ms. Doak's paper begins; she examines how FERC might have issued a Certificate of Public Convenience and Necessity at the start of the project when its financial feasibility proved suspect. She concludes that the problem is with FERC's failure to scrutinize the so-called precedent agreements that the pipeline's promoters relied on to convince FERC that gas traveling through the pipeline would find a market. Ms. Doak argues that "allowing precedent agreements to determine public need puts the very companies FERC regulates in charge of determining need." Her solution? Legislation requiring FERC to better scrutinize the agreements that pipeline promoters rely on to obtain Certificates of Public Convenience and Necessity.

Working with Ms. Doak on her independent study has been quite easy. Because she is self-motivated and hardworking, I have not had to prompt her work in any manner. And while I did not have foreknowledge of the FERC permitting process, she has managed to make an unusually opaque

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administrative process accessible. Finally, when we have met to discuss the progress of her paper, she is always open to my suggestions and critiques.

Ms. Doak's academic credentials speak for themselves. She has persistently distinguished herself as an exceptional student of the law. And it speaks volumes that based on her academic performance (and interpersonal skills) that four of my colleagues have recruited Ms. Doak to serve as their teaching assistant. I will add one observation about her transcript. My primary teaching obligations are with the College of Law's first-year Legal Method and Writing Program. I did not work with Ms. Doak in her 1L writing courses, but she performed at the top of her class in both semesters. Each semester was taught by a different member of the writing faculty. I note this because a student writer's success with one writing professor might sometimes reflect a simple stylistic compatibility. But excellence recognized by two different writing faculty is a strong indication that a student has an agile command of the legal writing craft; that is, the student is able to modify her analysis and writing depending on the expectations of her reader. I believe this sort of flexibility truly bodes well for success in chambers.

In sum, I believe Ms. Doak will be an exceptional judicial clerk. If I may be of further assistance in your assessment of her qualifications, please do not hesitate to contact me.

Very truly yours,



Andrew M. Carter
Clinical Professor of Law

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KAREN BRADSHAW
Professor of Law
kbradshaw@asu.edu

June 7, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is my pleasure to write this letter of recommendation on behalf of Caitlin Doak, an exceptional student at Sandra Day O'Connor College of Law at Arizona State University. Caitlin is an excellent student, diligent research assistant, and highly valued member of the ASU law community. She is clerking for Chief Justice Robert Brutinel in 2021-2022. With the encouragement of the ASU law faculty, Caitlin now seeks a federal clerkship from 2022-2023. She would be an excellent addition to any chambers.

Caitlin is a top law student. She has consistently scored at the top of her class in several courses, including legal writing. She is in the top 5% of her class of 259 students, with an impressive 3.95 grade point average and many honors, including The O'Connor Honors Fellow, Williard H. Pedrick Scholar, and Joseph Feller Memorial Fellowship. Caitlin is active as a law review editor and moot court competitor. She has been a research assistant and teaching assistant for several professors. Her law school success is the latest in a long record of success, including graduating magna cum laude from her undergraduate institution, where she was a Phi Beta Kappa member.

In addition to her impressive transcript and resume, Caitlin is a joy to work with. In her capacity as my research assistant, I have observed Caitlin to be diligent, hard-working, self-directed, and talented. She is understated, humble, respectful, and enthusiastic.

During her time in law school, Caitlin has worked in four law offices, worked for a federal agency, and externed for Judge Rayes on the US District Court. These experiences, coupled with her forthcoming Supreme Court Clerkship, provide a wide array of exposures to law practice, which will add value to her as a clerk.

Caitlin is also well-rounded, with a long-term commitment to showings of remarkable physical and mental endurance. She performed the impressive feat of hiking the Appalachian Trail before attending law school. She also runs marathons and rock climbs.

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These outstanding physical accomplishments reflect Caitlin's determination and ability to accomplish challenging, long-term goals.

In sum, I think very highly of Caitlin and recommend her without reservation. I sparingly offer letters of recommendation for clerkships, reserving them only for the most exceptional candidates at ASU. Caitlin is the only student I am recommending for the 2022-2023 term; I think she is outstanding. Please do not hesitate to contact me at kbradshaw@asu.edu or my cell phone, (530)355-4035, if you have any additional questions about Caitlin.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karen Bradshaw'.

Karen Bradshaw
Professor of Law

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CAITLIN M. DOAK

5615 N. Palacio Way, Phoenix, AZ 85014
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The following is a bench memo I wrote for Professor Trevor Reed's Indian Law II course during the Spring 2020 semester. The assignment was to write a bench memo on *Sharp v. Murphy*, 140 S. Ct. 2412 (2020). The assignment did not include a statement of facts. At the time of writing this memo, this case was pending in front of the U.S. Supreme Court. The issue was whether Congress disestablished the Creek Reservation. After this memo was written, the Supreme Court decided this case *per curiam* on the basis of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). I am the only person who edited this memo.

I. Issue

Did Congress disestablish the Creek reservation?

II. Brief Answer

Likely no. Under *Solem*, Congress likely did not disestablish the Creek reservation.

III. Procedural Posture

A jury convicted Patrick Murphy, a member of the Muscogee (Creek) Nation, of murder in Oklahoma state court and imposed the death penalty. *Murphy v. Royal*, 866 F.3d 1164, 1173 (10th Cir. 2017). Under the Major Crimes Act, if the murder took place on an Indian reservation, then Oklahoma state courts did not have jurisdiction to convict Mr. Murphy, a member of the Creek Nation. *Id.* at 1171; 18 U.S.C. § 1153 (“Any Indian who commits . . . murder . . . within the Indian country . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.”).

After seeking direct appeal and post-conviction relief in Oklahoma state courts, Murphy petitioned the Eastern District of Oklahoma for a writ of habeas corpus, arguing the state courts did not have jurisdiction to convict him. *Id.* The district court denied habeas relief, finding that the state court decisions were not contrary to federal law. On appeal, the Tenth Circuit reversed and held that under the *Solem v. Bartlett* test, Congress had not disestablished the Creek reservation. *Id.* at 1172. This Court granted Oklahoma’s petition for writ of certiorari.

IV. Standard of Review

This Court reviews the question of whether Congress disestablished the Creek reservation de novo.

V. Discussion

Only Congress can disestablish an Indian reservation. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Courts should not infer diminishment lightly. *Id.* In *Solem*, this Court identified three factors to determine whether Congress intended to disestablish an Indian reservation: (1) the text of the statute; (2) contemporaneous history; and (3) subsequent history. *Id.* at 470–71. The text is the “most probative evidence of congressional intent.” *Id.* at 470. Under the canons of Indian treaty construction, ambiguous statutory language ought to be construed to benefit the tribe. *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992). Without clear textual evidence of congressional intent, the contemporaneous history must “unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.” *Id.* at 471. Courts give the least amount of weight to subsequent history. *Id.*

This Court has never found that Congress disestablished a reservation under the second and third factors alone, nor has this Court applied the *Solem* factors to a disestablishment case without a surplus land act. However, in *Osage Nation v. Irby*, the Tenth Circuit held that evidence under the second and third factors alone was sufficient to find intent to disestablish a reservation. 597 F.3d 1117 (10th Cir. 2010). Additionally, *Irby* did not involve surplus lands, yet the Tenth Circuit applied the *Solem* factors. *Id.* at 1123.

A. Petitioner’s Argument, Analysis, and Clarifying Questions

Petitioner argues that Congress disestablished the Creek reservation. Pet’r’s Br. 19. Petitioner argues that *Solem*, which applies to surplus land cases, does not apply to the Five Tribes because of the “anomalous” history of the land. *Id.* at 47–48. Congress promised the Five Tribes communal patents for land to own in fee simple. *Id.* at 5. Allotment of the Five Tribes’

land, which Congress exempted from the General Allotment Act, was “inextricably intertwined with Congress’s systematic and deliberate liquidation of the Five Tribes as territorial sovereigns to pave the way to create a new State.” *Id.* Congress extinguished the land patents, abrogated material promises, and dissolved tribal sovereignty. *Id.* at 47.

Alternatively, Petitioner argues Congress disestablished the Creek reservation even under *Solem*. *Id.* at 49. First, the statutory text shows that Congress “expressly repudiated” any promises of a reservation by dismantling tribal title and revoking tribal jurisdiction. *Id.* The Oklahoma Enabling Act shows Congress expressly made the Indian Territory part of a state and granted state courts jurisdiction over matters involving Indians, creating a jurisdictional gap. *Id.* at 49–50. The effect of the acts leading up to statehood shows congressional intent to extinguish tribal title, whether through allotment or cession. *Id.* at 51.

Second, Petitioner argues contemporaneous history shows that “[t]hroughout negotiations and the legislative process, Congress, the executive branch, and tribal leaders all understood” that Congress intended to disestablish the Five Tribes’ reservations. *Id.* For example, Congress established the Dawes Commission “in pursuance of a policy which looked to the final dissolution of the tribal government.” *Id.* at 9. Disestablishment need not occur in a single step, and the history surrounding Oklahoma statehood demonstrates disestablishment through “death by a thousand cuts.” *Id.* at 52.

Third, Petitioner argues that the subsequent history and demographics necessitate a finding of disestablishment. *Id.* Congress continued to strip away restrictions on alienation of allotments until, twenty years after statehood, 89% of the former Indian territories were free from any restrictions on alienation. *Id.* at 53. Congress granted increased jurisdiction to state courts and subjected tribal members’ allotments to state real property law. *Id.* Oklahoma asserted state

regulatory power over the territory, and Congress and the courts referred to the land as former Indian territories. *Id.* at 54–55.

Lastly, Petitioner argues that public policy should remove this case from the *Solem* framework: affirming would “upset[] a century of settled expectations” and have “seismic” implications on criminal and civil law. *Id.* at 56. An affirmance could jeopardize other state court convictions, confuse regulatory authority, and shock the 1.8 million residents who live in Eastern Oklahoma. *Id.* at 15.

Although Petitioner tries to remove this case from the *Solem* framework, the Five Tribe’s history does not seem so anomalous to warrant ignoring the *Solem* test. While not binding, the Tenth Circuit applied the *Solem* factors to a reservation without a surplus lands act. Shouldn’t the Court apply *Solem* here? Furthermore, Congress referred to parcels remaining after allotment under the Five Tribes Act as “surplus lands.” Isn’t that enough to bring this case within the ambit of *Solem*? If the Court does not apply *Solem*, what framework should the Court use to decide this case?

Petitioner’s arguments under *Solem* are weak because the *Solem* test is “well settled” and focuses on statutory text. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078 (2016). Petitioner cannot point to any specific statutory language that shows intent to disestablish. The effects of different acts Petitioner relies on seem to illustrate contemporaneous history, not statutory text. Petitioner argues that statutory text clearly weakened the Creek Nation’s governmental power. Is congressional intent to weaken the tribe’s governmental power in preparation for Statehood relevant in determining disestablishment? Given this Court’s emphasis on the first factor, the second and third factors must be extraordinarily strong to overcome a lack of clear statutory text. Here, the contemporaneous history does not “unequivocally” support a finding of

disestablishment. Furthermore, Indian rules of statutory interpretation bolster Respondent's *Solem* argument. Shouldn't the Court apply Indian rules of statutory construction in this case?

Petitioner's strongest argument is that the Court must find disestablishment based on public policy. An affirmance could upset the settled expectations of the 1.8 million people living in Eastern Oklahoma, a minority of whom are Native American. Do the possible implications justify overlooking established law? Shouldn't the Court apply the law and let Congress work with the Tribes and Oklahoma to resolve these concerns? How will affirming the Tenth Circuit's decision affect non-Indians living on reservation land given the Court's decision in *Oliphant v. Suquamish Indian Tribe* that tribes do not have criminal jurisdiction over non-Indian residents? 435 U.S. 191, 212 (1978). Should the Court give any weight to demographics at all, given that in *Parker* less than 2% of tribal members lived on the land in question, and the Court still found no disestablishment? 136 S. Ct. at 1078, 1082.

B. Respondent's Argument, Analysis, and Clarifying Questions

Respondent argues that *Solem* is the correct framework the Court must follow. Resp't's Br. 26. Respondent analogizes to the history of the land in other cases, noting that the statutes are from the same allotment era, and the 1901 agreement involved surplus lands. *Id.* at 26–27. The historical differences that do exist favor the Creek. *Id.* at 27. For example, more land remained in Creek hands after the 1901 agreement than in cases with a surplus land act. *Id.*

Next, Respondent argues that Congress did not disestablish the Creek reservation under *Solem*. Resp't's Br. 26. First, accusing Petitioner of “[s]wapping story for text,” Respondent argues no statute disestablished the Creek Reservation under the first *Solem* factor. *Id.* at 21, 29. The 1856 and 1866 agreements show that Congress could have used clear disestablishment language with regards to Creek borders; it had done so in the past. *Id.* at 25. Citizenship and

statehood are consistent with reservation status, so the Oklahoma Enabling Act, without specific language, did not disestablish the Creek reservation. *Id.* at 35. Similarly, allotment is “completely consistent with continued reservation status.” *Id.* at 25 (citing *Mattz v. Arnett*, 412 U.S. 481, 497 (1973)). Land retains its reservation status regardless of what happens to the title of individual plots “until Congress explicitly indicates otherwise.” *Id.* (quoting *Solem*, 456 U.S. at 470). Thus, the 1901 agreement, ending communal tenure via allotment, does not support disestablishment. *Id.* at 30–31. Furthermore, this Court has held the same language in the 1901 agreement insufficient to disestablish a reservation. *Id.* at 24–25. While Congress may have intended the 1901 agreement to end the Creek government, Congress preserved the Creek government and its territorial jurisdiction in the Five Tribes Act. *Id.* at 3.

Second, Respondent argues the contemporaneous history does not evince congressional intent to disestablish the Creek reservation. *Id.* at 39. Congress may have wanted cession at one time, but Congress retreated from this position and accepted allotment. *Id.* at 40. Additionally, Congress reversed the 1901 agreement to avoid dissolution. *Id.* at 42–43. Respondent relies on the high standard set by *Solem* and argues that “mixed historical evidence” never supports disestablishment. *Id.* at 43 (quoting *Parker*, 136 S. Ct. at 1080).

Third, Respondent argues that post-statehood events do not show congressional intent to disestablish. *Id.* at 50. Respondent relies on the textual nature of the *Solem* test: “Equivocal post-enactment history cannot substitute for textual clarity.” *Id.* Additionally, Congress repeatedly recognized the Creek reservation’s borders after the Enabling Act. *Id.* Congressional authorization giving more authority to the State does not show disestablishment but shows that Congress retained authority over the reservation while allowing the State to exercise some regulatory and judicial power. *Id.* at 53–54. Furthermore, the State unlawfully asserted

jurisdiction in some cases. *Id.* at 54. The Creek Nation maintains its presence within the reservation and operates services such as hospitals that benefit non-Indians. *Id.* at 55.

Respondent analogizes to the history of the land in other cases to keep this case within the *Solem* framework. *Id.* at 26. However, in establishing the test in *Solem*, the Court identified a “fairly clean analytical structure” for distinguishing between certain “surplus land Acts” that diminished reservations and those that did not. 465 U.S. at 470. Given that the Court intended the *Solem* test to apply to surplus land acts and has never applied the test to cases without such an act, shouldn’t the Court find a new framework for this case? The Court likely should apply the *Solem* test because even without a surplus land act, the case still involves allotment and surplus lands.

If the Court applies *Solem*, Respondent has a convincing argument for affirming. A textual reading of the acts does not evince congressional intent to diminish the reservation like the statutory text did in *South Dakota v. Yankton Sioux Tribe*. 522 U.S. 329, 333 (1998). Respondent shows how the language of individual acts do not support disestablishment. However, isn’t it possible that the statutory language of the acts in question together evince congressional intent to disestablish? Furthermore, given the Tenth Circuit’s decision in *Irby*, can’t the contemporaneous and subsequent history suffice for a determination of disestablishment? This Court acknowledged that de facto diminishment may occur when an area “has long since lost its Indian character.” *Yankton*, 522 U.S. at 356. Given the past 100 years and the reasonable expectations of the people of Oklahoma, shouldn’t the court find de facto diminishment here? If affirmed, what will happen to other prisoners convicted in state court?

VI. Conclusion and Recommendation

The law is on the side of the Respondent. Petitioner's arguments to ignore *Solem* are weak, and under *Solem*, Petitioner cannot show congressional intent to disestablish. Petitioner's policy arguments are compelling, but Congress can and should be the branch to address those issues. The Court should affirm.

Applicant Details

First Name **Michael**
 Middle Initial **D**
 Last Name **Doering**
 Citizenship Status **U. S. Citizen**
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Address

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--

Contact Phone Number **7152181302**
 Other Phone Number **7152181302**

Applicant Education

BA/BS From **University of Wisconsin-Eau Claire**
 Date of BA/BS **May 2015**
 JD/LLB From **University of Wisconsin Law School**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=35002&yr=2009
 Date of JD/LLB **June 1, 2021**
 Class Rank **15%**
 Law Review/Journal **Yes**
 Journal(s) **Wisconsin Law Review**
 Moot Court Experience **No**

Bar Admission

Admission(s) **Wisconsin**

Prior Judicial Experience

Judicial
Internships/ **Yes**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

MICHAEL DOERING

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August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year student at the University of Wisconsin Law School writing to apply for a 2021–2023 term clerkship in your chambers.

I have significant research and writing experience which will make me an effective judicial clerk. During my second year of law school, I interned with the Honorable Judge Blanchard at the Wisconsin Court of Appeals. During my time interning with Judge Blanchard, I was assigned cases, analyzed the case record and appellate briefs, and discussed my opinions with Judge Blanchard and his law clerk. I ultimately ended up drafting opinions and incorporating feedback into said opinions.

I also worked for the Oxford Federal Project at the University of Wisconsin Law School. In that capacity, I assisted federal prison inmates with a variety of post-conviction issues. My job typically entailed researching the law and the facts as they pertained to our clients' cases and evaluating whether our clients had a legitimate post-conviction claim. Because there are potential procedural hurdles to individuals pursuing post-conviction relief, I also analyzed whether existing law would procedurally bar an otherwise valid legal claim. If the client had a legitimate claim for relief, I assisted them with drafting motions that they could then file. I also assisted my supervisor with criminal appeals, which involved writing and editing appellate briefs as well as preparing for oral argument. I am also currently working as a law clerk for the Dempsey Law Firm. This job involves researching legal issues as they are assigned to me and drafting various legal documents, including memoranda, motions, and briefs.

I am attaching my resume, transcript, and writing sample. My writing sample is a redacted legal memorandum that I wrote for the Oxford Federal Project on whether an individual must commit an overt act to be convicted for conspiracy under 18 U.S.C. § 1594(c). Please let me know if I can provide any additional information. Thank you very much for considering my application. I hope to have the opportunity to interview with you.

Respectfully,

Michael Doering
Candidate for Juris Doctor 2021

Enc.

MICHAEL DOERING

509 North Lake Street, Apartment #305, Madison, WI 53703 • 715-218-1302 • michaelddoering@gmail.com

EDUCATION

University of Wisconsin Law School	Madison, WI
<i>Juris Doctor Candidate</i>	<i>May 2021</i>
GPA:	3.56 (Top 15%)
Journal:	<i>Wisconsin Law Review</i> , Managing Editor
Awards:	Spring 2019 Best Brief Competition Finalist Dean's Honor List – Fall 2018 & Spring 2019
University of Wisconsin - Milwaukee	Milwaukee, WI
<i>Master of Arts in Philosophy</i>	<i>May 2018</i>
Thesis:	<i>A Liberal Analysis of Religious Exemptions to Public Accommodation Laws</i>
University of Wisconsin – Eau Claire	Eau Claire, WI
<i>Bachelor of Arts in Philosophy and Religious Studies, cum laude</i>	<i>May 2015</i>
<i>Ethics Certificate</i>	

EMPLOYMENT

Dempsey Law Firm	Wausau, WI
<i>Law Clerk</i>	<i>February 2020 – Present</i>
<ul style="list-style-type: none"> Conduct legal research and write legal memoranda Draft various legal documents, including motions, briefs, affidavits, etc. 	
Frank J. Remington Center – Oxford Federal Project	Madison, WI
<i>Project Assistant</i>	<i>May 2019 – May 2020</i>
<ul style="list-style-type: none"> Conduct interviews with federal prison inmates to ascertain potential post-conviction issues Conduct legal research and draft legal correspondence, memoranda, and motions Analyze potential appellate issues and assist with writing of appellate briefs 	
Wisconsin Court of Appeals – Judge Blanchard	Madison, WI
<i>Judicial Intern</i>	<i>September 2019 – December 2019</i>
<ul style="list-style-type: none"> Reviewed case record and appellate briefs Analyzed arguments in briefs, conducted legal research, and drafted bench memoranda and court opinions Conferred with judge and law clerk regarding ongoing cases and incorporated feedback into draft opinions 	
University of Wisconsin - Milwaukee	Milwaukee, WI
<i>Graduate Teaching Assistant</i>	<i>September 2016 – May 2018</i>
<ul style="list-style-type: none"> Taught discussion sections and held office hours to address student questions and concerns Graded coursework and maintained confidential academic records for students Performed independent research which culminated in publication of graduate thesis 	

PRESENTATIONS & PUBLICATIONS

One Step Forward: Compassionate Release Under the First Step Act, Wisconsin Law Review (forthcoming)

“Public Accommodation Laws and the Integrity of Wedding Vendors,” Presented at 2018 meeting of the Wisconsin Philosophical Association

“Religious Belief and Rational Inquiry,” Presented at 2015 Celebration of Excellence in Research + Creative Activity at University of Wisconsin - Eau Claire

Michael Doering
University of Wisconsin Law School
Cumulative GPA: 3.56

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure I	Megan McDermott	A	4	
Contracts I	Kathryn Hendley	A-	4	
Introduction to Substantive Criminal Law	Adam Stevenson	A	4	
Legal Research and Writing I	Trina Tinglum	B+	3	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Criminal Procedure	Cecelia Klingele	B+	3	
Legal Research and Writing II	Kim Peterson	A-	3	
Property	Miriam Seifter	B	4	
Torts I	Pilar Ossorio	A-	4	

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Evidence	Kim Peterson	B+	3	
Law & Correctional Institutions	Adam Stevenson	S	3	Course Was Pass/Fail
Oxford Federal Project	Adam Stevenson	S	4	Clinic
Professional Responsibilities	Megan McDermott	B+	3	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law I	Rebecca Zietlow	A+	3	
Judicial Internship	Lindsay Healless	S	3	Graded Pass/Fail
Oxford Federal Project	Adam Stevenson	S	2	Clinic
Role of Police in Free Society	Cecelia Klingele	B	3	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure II	Nina Varsava	SD	4	
Equal Employment Law	David Rice; Anne Bensky	SD	2	
First Amendment	Anuj Desai	SD	3	
Insurance Law	James Friedman	SD	3	

Law Review	Keith Findley	S	2
Oxford Federal Project	Adam Stevenson	S	2
Trusts & Estates I	Joseph Maier	B+	2

This semester, with the exception of Trusts & Estates, was graded on a pass/fail basis due to the coronavirus pandemic. SD stands for "Satisfactory-Disruption."

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Miriam Seifter	N/A	3	
Advanced Criminal Procedure: Representing the Criminal Appellant	Tristan Breedlove & Ellen Krahn	N/A	3	
Constitutional Law II	Asifa Quraishi-Landes	N/A	3	
Criminal Appeals Project	Tristan Breedlove & Ellen Krahn	N/A	2	
Immigration Law	Erin Barbato	N/A	3	
Sentencing & Corrections	Cecelia Klingele	N/A	3	

Grading System Description

Courses are graded on a letter-graded scale from F to A+. Expressed numerically, this is a 4.3 scale.

August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to strongly recommend Michael Doering for a clerkship in your chambers. I know Michael through supervising his work as a student in my Oxford Federal Project clinical program, as well as his assistance on a federal direct appeal. Michael's work on the appeal came about through the initiative of the entire Oxford Project cohort, of which Michael was an enthusiastic and hard-working part. Our clients and I could not have asked for anything more than a student with Michael's skill and dedication to have worked on the cases. His experience as a student in the clinic and beyond will be of great service to a clerkship in any chambers.

Michael's work on the appeal and in the Project exceeded my expectations, and exemplified his overall abilities as an attorney. Michael demonstrated a knack for efficiently researching and writing a legal brief. In many aspects of his work, Michael took the initiative to move beyond the assignment at hand, working well ahead of our timeline and tasks. When faced with a problem, Michael did not relent until he had solved the issue. This high-intensity pace did not negatively affect his work product, as throughout the Oxford Project and in working on the appeals, Michael's drafts were well-written, thoughtful, and demonstrated sound reasoning.

Michael really shined in quickly learning and adapting to new areas of law from different jurisdictions. This may be Michael's strongest suit, and will be of great service in the clerkship environment. During his time in the clinical program, he dealt with family law concerns, driver's licensing regulations, and state criminal law, all from different states, sometimes for the same client. He also worked in developing areas of federal sentencing reform, working to grasp this evolving area of law.

With regard to other federal legal issues, Michael demonstrated a talent for quickly understanding a topic area involved with his client's case, and efficiently researching the matter at hand. This work all took place under very tight time constraints. Michael's work in wide-ranging areas of law demonstrates his excellent research and writing abilities. This experience also speaks to his strong organizational skill while dealing with a large caseload and workload. In a setting where a clerk may go from a criminal case one moment, to a complex intellectually property or other civil dispute the next, Michael's ability to quickly develop competence and expertise in a wide range of fields will be a great asset to your court.

Michael's work juggling several different fields of law continued in the classroom, where he strived for, and achieved, the same high level of success. Michael worked to obtain a wide-ranging legal education; all while performing near the top of his class. While excelling academically, with a full course load and Wisconsin Law Review responsibilities, Michael took a wide variety of courses, excelling in them all. Through his clinic and coursework, Michael clearly demonstrated an aptitude for handling a variety of legal issues at once, a perfect skill for a judicial clerk.

In addition to his substantive legal skills, Michael is also extremely well organized and diligent in all aspects of his work. Often times, in the clinic setting, a fair amount of supervisory poking and prodding is necessary in the early months to get students to effectively advocate for their client. From the start, Michael needed little suggestion or help in this area. When a client needed something to be done, Michael exercised reasoned initiative and handled the matter, often before we set any informal deadlines.

Michael also excels at communicating with his peers, clients and others in the legal community. Michael's discussions with legal community members were prompt, professional, and exhibited a keen eye toward gathering the necessary information to assist his clients. In the world of interconnected legal practice, Michael's interpersonal skills are one of many abilities that would be of great service in your chambers.

In summary, Michael met and far exceeded my expectations as a student and future attorney. I enthusiastically recommend Michael for a judicial clerkship in your chambers for the temporary clerkship position. If you have any questions with regard to this recommendation, please do not hesitate to contact me at (608) 262-9233 or adam.stevenson@wisc.edu.

Sincerely,

/s/ Adam Stevenson

Adam Stevenson

Adam Stevenson - clastevenson@wisc.edu

Clinical Professor
FRANK J. REMINGTON CENTER

Adam Stevenson - clastevenson@wisc.edu

August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Michael Doering, a second-year law student at the University of Wisconsin Law School, has asked me to write a letter in support of his application to serve as your law clerk. I am happy to do so. Michael would be a top-notch clerk.

First, Michael is a very strong student. Although not at the top of his class, Michael has a high overall GPA. He took one class from me last year, an introductory course on Legislation and Regulation, and is currently (Spring 2020) enrolled in a second class, an upper-level course on the First Amendment. He did very well in the Legislation and Regulation course, earning an A- in the course. [I am a tough grader. I gave only 1 A and 1 A+ out of a class of 35.]

The Legislation and Regulation course was an introduction to statutory interpretation and the regulatory state, and the way I structure my “exam” is somewhat different from most other classes. First, the “exam” is an open-book 8-hour take-home assignment, rather than an in-class exam. Second, and more important, rather than an “issue spotting” exam, I give the students a mass of materials (that year’s exam had more than 25 single-spaced pages) and so part of their task is to sift through those materials to determine what is important. Moreover, though there is of course a time limit, I also impose a more important constraint, a word limit, which effectively forces the students to make choices about what the important issues are, thereby rewarding the students who can both analyze and exercise judgment, rather than just rewarding the students who are fastest and can say the most.

The substance of the exam involved complex questions of statutory interpretation, and the materials I provided the students consisted of a couple of statutes, extensive excerpts from the Federal Register and Code of Federal Regulations, along with some legislative history. Moreover, because the class was a methods class, the exam tested the students’ ability to grapple with a new substantive area of law: I gave them a question from an area of law they had never encountered. The goal was to have them apply their knowledge of both the general principles of statutory construction and the relationship between agencies and courts to a new situation. To do well on that “exam”—as Michael certainly did—required the ability to analyze and to exercise judgment as well as to grapple with a new area of law, all skills that are, as you know, vital to a law clerk’s job.

Second, more than just his ability to do well in law school exams, Michael has a precision of thought and expression that will be crucial for being a good law clerk. He asks questions regularly, both in class and in office hours, and with a thoughtful and inquisitive manner.

Moreover, when he does so, his questions go to the heart of a legal problem, both analytically and practically. I always look forward to one of Michael’s questions, as they keep me on my toes, usually forcing me to think more deeply about the material.

In short, I recommend Michael in very strong terms. If you have any further questions about him, please do not hesitate to contact me via e-mail (anuj.desai@wisc.edu) or telephone (608-263-7605).

Sincerely yours,

/s/ Anuj Desai

Anuj C. Desai

Anuj Desai - anuj.desai@wisc.edu - 608-263-7605

August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am pleased to recommend Michael Doering for a judicial clerkship in your chambers. Michael is a terrific student, currently ranked in the top 10% of his class here at the University of Wisconsin Law School. I have been impressed by Michael's combination of intellectual power, curiosity, and thoughtfulness. I believe he will be a very strong law clerk.

Michael was an excellent participant in my Property Law class. Property Law tends not to be a favorite first-year subject, and the dense material often makes students hesitant to participate. Michael was a lifesaver. He often volunteered – always politely and humbly – when no one else would. His answers reflected a mature understanding of even the most complex topics; the knotty doctrinal rules did not obscure for him the underlying premises and deeper questions. Michael's participation elevated our classroom discussions.

Given his stellar participation, I was surprised when Michael earned only a B on my exam – a grade that appears to be his lowest in law school. I can say that Michael is a strong writer, and that his grade reflects simply having overlooked one issue on the exam. This can happen to even the best students, and it does not diminish my expectation that Michael will be an excellent law clerk and lawyer.

Indeed, Michael has distinguished himself in other ways in law school. For example, Michael is an editor of the Wisconsin Law Review, was a finalist in the law school's Best Brief competition, and has worked as a judicial intern on the Wisconsin Court of Appeals. He also has a penchant for writing; he has written briefs during his clinical work in the law school's Oxford Federal Project and has elected to write a paper in his Civil Procedure II seminar.

Finally, although I have not had opportunities to work with Michael closely, he strikes me as a pleasant, affable person who would bring a calm professionalism to any workplace he joins. I recommend him highly. Please feel free to contact me with any questions about his candidacy via email at miriam.seifter@wisc.edu or phone at 608-265-4771.

Sincerely,

/s/ Miriam Seifter

Miriam Seifter
Associate Professor of Law

Miriam Seifter - miriam.seifter@wisc.edu

MEMORANDUM

To: NAME

From: Michael Doering

Re: 18 U.S.C. § 1594(c) – Overt Act Requirement

Date: DATE

QUESTION PRESENTED

Did the district court err when it failed to instruct the jury that it must find an overt act to find NAME guilty of conspiracy to sex traffic under 18 U.S.C. § 1594(c)?

BRIEF ANSWER

The district court did not err when it did not include an overt act as an element in the conspiracy jury instruction. The Seventh Circuit and the Supreme Court has held that the statutory language is controlling as to whether an overt act is an element of the criminal offense. The conspiracy statute at issue, 18 U.S.C. § 1594(c), does not explicitly reference any overt act as an element of the crime, so the jury did not need to find that NAME committed an act in furtherance of the conspiracy to find THEM guilty of conspiracy to commit sex trafficking. Therefore, the district court did not err with regard to its conspiracy jury instruction. Even if the jury instruction was erroneous, the instruction is subject to plain error review on appeal. It is unlikely the appellate court would find that the jury instruction was plainly erroneous as the plain error standard is demanding, and there appears to be a circuit split on the issue. Furthermore, erroneous jury instructions are subject to a harmless error analysis, and the appellate court would likely find that the jury instruction, if erroneous, was a harmless error.

STATEMENT OF FACTS

A jury found NAME guilty of conspiracy to commit sex trafficking in violation of 18 U.S.C. §§ 1594(c) and 1591(a)(1). (Judgment, ECF No. XX.) MAGISTRATE JUDGE, in a pre-trial order,

noted that the conspiracy count in the indictment did not allege any overt acts. (*See* Order Draft Voir Dire, ECF No. XX.) MAGISTRATE JUDGE additionally noted that there was no authority in the Seventh Circuit concerning whether conspiracies charged under § 1594(c) require proof of an overt act in furtherance of the conspiracy. *Id.* Based on the record, both parties neglected to address MAGISTRATE JUDGE’S concern before the trial began. During the trial, the judge instructed the jury on the elements of the conspiracy count. The court stated that there were two elements: (1) the sex trafficking conspiracy existed, and (2) the defendant knowingly became a member of this conspiracy with an intention to further the conspiracy. (Trial Transcripts, DATE, Page XXXX.) I have been asked to analyze whether a conspiracy to sex traffic in violation of § 1594(c) must include the completion of an overt act in furtherance of the conspiracy. Furthermore, I analyze whether a challenge to the jury instruction is an issue worth pursuing on appeal. I conclude that it is not.

DISCUSSION

I. The appellate court would review the conspiracy jury instruction for plain error.

The appellate court generally reviews whether jury instructions accurately summarize the law *de novo*. *See United States v. Daniel*, 749 F.3d 608, 613 (7th Cir. 2014). However, when a party does not object to a jury instruction in the district court, the appellate court reviews the instruction for plain error. *United States v. Jones*, 739 F.3d 364, 371 (7th Cir. 2014). NAME did not object to the conspiracy jury instruction during trial. (*See* Trial Transcript, DATE, Page XXX.) Thus, the appellate court would review the jury instruction for plain error.

II. The conspiracy jury instruction was not plainly erroneous.

The plain error test is “remarkably demanding.” *United States v. Butler*, 777 F.3d 382, 388 (7th Cir. 2015). To satisfy the plain error test, the appellant must meet four requirements: (1) there was a legal error, an objection to which was not affirmatively waived by the appellant; (2) the legal error is clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the

appellant's substantial rights, which means the appellant must demonstrate that it affected the outcome of the district court proceedings; (4) the error seriously affected the fairness, integrity or public reputation of the judicial proceeding. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

First, NAME did not affirmatively waive an objection to the conspiracy jury instruction. A court finds that a party forfeited an objection when they negligently or accidentally fail to raise an argument. *United States v. Seals*, 813 F.3d 1038, 1045 (7th Cir. 2016). However, forfeiture is distinct from an affirmative waiver. An affirmative waiver occurs when a party intentionally relinquishes or abandons an objection. *Id.* Since there appears to have been no discussion on the conspiracy instruction from either party, a court would likely not find that NAME *intentionally* relinquished or abandoned a possible objection to the jury instruction. At the very least, there is a good-faith argument available that the lack of any objection was a result of negligence or accident rather than an intentional waiver. Thus, NAME can likely meet the first requirement of the plain error test.

However, regarding the second requirement of the plain error test, the legal error in the jury instruction was not clear and obvious. The district court likely did not err when it did not include completion of an overt act as an element of conspiracy to commit sex trafficking. Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act. *Ianelli v. United States*, 420 U.S. 771 (1975). Whether a conspiracy requires an overt act depends on the text of the statute that criminalizes the conspiracy. *United States v. Jett*, 908 F.3d 252, 264 (7th Cir. 2018). The Supreme Court has held that absent contrary indications, Congress intends to adopt the common law definition of statutory terms. *United States v. Shabani*, 513 U.S. 10, 13–14 (1994). The common law understanding of conspiracy does not make the doing of any act other than the act of conspiring a condition of liability. *Id.* The statute at issue states that “[w]hoever conspires with another to violate section 1591” is guilty of violating the statute. 18 U.S.C. § 1594(c). The statute includes no explicit mention of any additional acts besides the act of conspiring with another. *Id.* Thus, the plain

language of the statute indicates that a violation of 18 U.S.C. § 1594(c) does not require the completion of an overt act in furtherance of the conspiracy.

The Supreme Court has also repeatedly held that conspiracy statutes that do not include explicit mention of overt acts do not incorporate the completion of overt acts as an element. For instance, 15 U.S.C. § 1 states that “[e]very person who shall . . . engage in any . . . conspiracy hereby declared to be illegal shall be deemed guilty of a felony.” 15 U.S.C. § 1. Because the text of 15 U.S.C. § 1 makes the act of conspiring the only condition of liability, the Supreme Court held that a conspiracy under that section does not require completion of an overt act. *See Nash v. United States*, 229 U.S. 373, 378 (1913). Also, 21 U.S.C. § 846 states that “any person who . . . conspires to commit any offense defined in this subchapter” is guilty of violating the statute. 21 U.S.C. § 846. Because 21 U.S.C. § 846 does not mention an overt act, the Supreme Court has held that proof of a § 846 conspiracy does not require proof of an overt act. *See United States v. Shabani*, 513 U.S. 10, 13–14 (1994). Because 18 U.S.C. § 1594(c) does not include any mention of overt acts, the appellate court is likely to find that the district court did not err when it instructed the jury that proof of a § 1594(c) conspiracy does not require proof of an overt act.

Other conspiracy statutes include *explicit* references to overt acts as an element of the crime, supporting the proposition that Congress did not intend to include completion of an overt act as an element of 18 U.S.C. § 1594(c). For example, 18 U.S.C. § 371 states that “[i]f two or more persons conspire . . . to commit any offense against the United States . . . , and one or more of such persons *do any act to effect the object of the conspiracy*,” they are guilty of violating the statute. 18 U.S.C. § 371 (emphasis added). Explicit references to overt acts in statutory language passed by Congress imply that Congress intended to make proof of overt acts a requirement for violations of criminal statutes only when an overt act is referenced. *See Shabani*, 513 U.S. at 14 (holding that the difference between statutes which require that a conspirator do any act to effect the object of the conspiracy and those

that do not “speak volumes.”) Congress could have modeled 18 U.S.C. § 1594(c) after § 371 to incorporate an overt act requirement. *See Whitfield v. United States*, 543 U.S. 209, 214 (2005). By choosing not to include an overt act requirement explicitly, and by omitting any reference to overt acts in the statute, Congress effectively dispensed with such a requirement. *Id.* Therefore, the second requirement of the plain error test—that the error is clear and obvious—is not met regarding the conspiracy jury instruction.

Because the conspiracy jury instruction was not erroneous, it did not affect the appellant’s substantial rights, nor did it negatively impact the fairness, integrity, or public reputation of the trial. However, the next section considers an alternative argument assuming that the jury instruction *was* erroneous. The following section analyzes the latter two requirements of the plain error test and conducts a harmless error analysis.

III. Even if the jury instruction was erroneous, the appellate court would likely find that the error was harmless.

The appellate court could agree with other courts and hold that 18 U.S.C. § 1594(c) incorporates an overt act requirement and that the jury instruction at issue was erroneous. *See United States v. Flanders*, 752 F.3d 1317, 1330 (11th Cir. 2014) (stating, without analysis, that a § 1594(c) conspiracy does require proof of an overt act); *Ricchio v. McLean*, 853 F.3d 553, 556–57 (1st Cir. 2017) (stating, without analysis, that a § 1594(c) conspiracy does require proof of an overt act in a case reviewing a dismissal order in a civil lawsuit). *But see United States v. Pascacio-Rodriguez*, 749 F.3d 353, 361 nn. 41 & 42 (5th Cir. 2014) (listing § 1594(c) as one of 99 federal conspiracy statutes that do not require proof of an overt act). However, given the fact that there is a circuit split on the issue, the appellate court is unlikely to conclude that the error was clear or obvious. Assuming the appellate court would find the error clear or obvious, the appellant would also have to establish that the error affected the outcome of the district court proceedings and that it seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *See Puckett*, 556 U.S. at 135.

It is unlikely that NAME can meet the last two requirements of the plain error test. First, it is unlikely that the jury instruction prejudiced NAME's substantial rights even if it was erroneous. One argument that the jury instruction did prejudice NAME's rights is that it omitted an essential element of the crime—the completion of an overt act. The jury may not have found NAME guilty of the conspiracy if it was not for this omission. However, a jury found NAME guilty of NUMBER counts of the substantive crime of sex trafficking. (*See* Judgment, ECF No. XX.) Assuming there was sufficient evidence for the jury to find NAME guilty of sex trafficking, there was likely also sufficient evidence for the jury to find that NAME performed overt acts in furtherance of the sex trafficking conspiracy. Regardless, even if an erroneous jury instruction prejudiced NAME's substantial rights, the appellate court would not reverse unless the error seriously affected the fairness, integrity, or public reputation of the trial. *United States v. Olano*, 507 U.S. 725, 736–37 (1993). While NAME could attempt to make such an argument, this requirement of the plain error test poses a significant obstacle.

Even if the appellate court concluded that the jury instruction was erroneous, it would also have to conclude that the error was harmful to the appellant. *See Neder v. United States*, 527 U.S. 1, 9–10 (1999) (holding that harmless error analysis applies to jury instructions omitting an element). An error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24 (1967). Because NAME was found guilty of the substantive crime, it is not clear that including an overt act element in the conspiracy jury instruction would have changed the jury's verdict. In other words, as stated above, if there was sufficient evidence for the jury to find NAME guilty of sex trafficking, there was also probably sufficient evidence for the jury to find that NAME performed overt acts in furtherance of the conspiracy to sex traffic. Thus, the jury instruction, if erroneous, likely qualifies as a harmless error because it did not contribute to the verdict obtained.

The government can also show that an error was harmless if it can prove that the error did not affect the sentence the district court imposed. *See United States v. Hines-Flagg*, 789 F.3d 751, 757 (7th Cir. 2015). In addition to the conspiracy count, the court convicted NAME of NUMBER counts of sex trafficking in violation of 18 U.S.C. §§ 1591(a)(1) and (b)(1), NUMBER counts of attempted sex trafficking in violation of 18 U.S.C. §§ 1591(a)(1) and (b)(1), and NUMBER counts of transporting a person in interstate commerce to engage in a commercial sex act in violation of 18 U.S.C. § 2421. (*See* Judgment, ECF No. XX.) The court subsequently sentenced NAME to NUMBER months in prison. (*Id.*) The maximum penalty that NAME faced for these counts was a term of life imprisonment. *See* 18 U.S.C. § 1591(b)(1). Thus, the government could argue that NAME would have been subject to the same sentence that he received even if the conspiracy charge was wholly excluded from the indictment. Whether NAME would have received a different sentence may depend on whether the district court substantially relied on the conspiracy conviction in determining the appropriate sentence. Because it does not seem like the district court substantially relied on the conspiracy conviction in determining the sentence, the jury instruction, if erroneous, likely qualifies as harmless error.

CONCLUSION

The district court did not err by omitting an overt act requirement from the jury instruction for the conspiracy charge under 18 U.S.C. § 1594(c). The statutory language of § 1594(c) does not include an overt act element, while other conspiracy statutes passed by Congress *do include* explicit overt act requirements. This discrepancy indicates that Congress intends to incorporate an overt act requirement only if such a requirement is explicit in the text. Even if the jury instruction was erroneous, given the high bar required for a reversible error under the plain error standard, it is unlikely that the appellate court would rule in NAME's favor on this issue. Thus, I conclude that this issue is not worth pursuing on appeal.

Applicant Details

First Name	Kole
Last Name	Donaldson
Citizenship Status	U. S. Citizen
Email Address	koledonaldson@gmail.com
Address	<div> Address Street 300 Whitworth Way, Building 300, Unit 110 City Williamsburg State/Territory Virginia Zip 23185 Country United States </div>
Contact Phone Number	(850) 428-3311

Applicant Education

BA/BS From	Hampden-Sydney College
Date of BA/BS	May 2019
JD/LLB From	William & Mary Law School
	http://law.wm.edu
Date of JD/LLB	May 20, 2022
Class Rank	10%
Law Review/Journal	Yes
Journal(s)	William & Mary Law Review
Moot Court Experience	Yes
Moot Court Name(s)	William & Mary Moot Court

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	No
--------------------------------------	-----------

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Larsen, Allison Orr
amlarsen@wm.edu
(757) 221-7985

Franklin, Jennifer R.
jrfranklin@wm.edu
757-221-2488

Mowen, Gordon
Gordon.L.Mowen@wvago.gov

References

REFERENCES

Professor Allison Larsen
William & Mary Law School
P.O. Box 8795
Williamsburg, Virginia 23187
(757) 221-7985
amlarsen@wm.edu

(Professor Larsen was my Constitutional Law professor and currently is my Administrative Law professor.)

Professor Jennifer Franklin
William & Mary Law School
P.O. Box 8795
Williamsburg, Virginia 23187
(804) 683-1038
jrfranklin@wm.edu

(Professor Franklin was my professor for Legal Writing and Advanced Brief writing, and she is my Moot Court coach.)

Mr. Gordon Mowen
Orndorff Mowen PLLC
135 Corporate Centre Drive, Suite 524, Scott Depot, WV 25560
(304) 545-7765

Gordon.Mowen@om-llc.com

(Mr. Mowen was my supervising attorney at the WV AG's Office.)

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Kole F. Donaldson
300 Whitworth Way, Apt. 110
Williamsburg, Virginia 23185
(850) 428-3311
kfdonaldson@email.wm.edu

May 31, 2021

The Honorable Elizabeth W. Hanes
U.S. District Court, Eastern District of Virginia
Spottswood W. Robinson III and
Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

My name is Kole Donaldson and I am a rising third-year student at William & Mary Law School. I am writing to apply for a clerkship in your chambers following my graduation in May 2022. I am in the top 15% of my class, and I am a member of the *William & Mary Law Review* and the Moot Court team.

My experiences at William & Mary Law School have helped prepare me to serve as a judicial clerk. As a staff member of the *William & Mary Law Review*, I have edited academic articles on a variety of legal issues while simultaneously writing my own Note. On the Moot Court team, I have prepared legal briefs and oral arguments on issues of constitutional law and products liability, and in the spring of 2021, my partner and I were the champions of the Rendigs National Products Liability Moot Court Competition. My internship at the Office of the West Virginia Attorney General in 2020 was devoted entirely to legal research and writing. I was given the primary responsibility of drafting two appellate briefs under the supervision of two attorneys and also performed research and drafted legal memoranda for trial and appellate cases.

I have enclosed my resume, law school transcript, undergraduate transcript, and writing sample. Thank you for your time and consideration. I would greatly appreciate the opportunity to interview and further discuss my experience and qualifications for this judicial clerkship.

Respectfully,

Kole Donaldson

Enclosures: Resume, Unofficial Transcripts, Writing Sample.

Kole F. Donaldson

300 Whitworth Way, #110
 Williamsburg, VA 23185
 (850) 428-3311 | kfdonaldson@email.wm.edu

EDUCATION

William & Mary Law School, Williamsburg, Virginia

J.D. expected, May 2022

G.P.A.: 3.6, Class Rank: 28/230 (tied)

Honors: **William & Mary Law Review**
 Moot Court
 Bushrod Tournament Champion (Moot Court recruitment competition)
 Rendigs National Products Liability Moot Court Competition Champion
 CALI Book Award (highest grade in torts)
 Cabell Scholarship (three-year academic scholarship)
 Phi Delta Phi, Jefferson Inn (international legal honor society)

Activities: Lewis B. Puller, Jr. Veterans Benefits Clinic (Spring 2021)
 Federalist Society
 Christian Legal Society (Vice President)
 Blackstone Legal Fellowship

Hampden-Sydney College, Hampden-Sydney, VA

B.A., *summa cum laude*, History, Religion Minor, May 2019

G.P.A.: 3.94

Honors: Class Rank: 3/188
 Phi Beta Kappa
 Omicron Delta Kappa (national leadership honor society)
 History Thesis: "French Nationalism and *Laïcité*."

Activities: Ethics Bowl Team (Captain of extemporaneous ethics debate team)
 Episcopal Campus Ministry, Service Chair (2017-2019)

Study Abroad: Institut Américain Universitaire, Aix-en-Provence, France, Summer 2018

EXPERIENCE

Office of the Attorney General for the District of Columbia, Washington, D.C.

Summer Associate

July 2021 to August 2021

TBA

Harman Claytor Corrigan & Wellman, Glen Allen, VA

Summer Associate

May 2021 to July 2021

TBA

Office of the West Virginia Attorney General, Charleston, WV

Summer Clerk

June 2020 to July 2020

Worked in two divisions of the Attorney's General Office, including the Criminal Appellate Division and the Solicitor's General Office. In Criminal Appellate Division, developed two appellate briefs for the West Virginia Supreme Court of Appeals on procedural issues with a petition for writ of mandamus and an extradition case with a complicated procedural history. For the Solicitor's General Office, devised several research memos on election law and online balloting systems, and assisted attorneys with motions to stay judgement for a ballot-order case.

Interests include: Shorin-Ryu Shorinkan Karate, Ancient, European, and American History, fiction reading.

Unofficial Transcript

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:

- Transcripts report student GPAs to the nearest hundredth. **Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth.** We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.
- Students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.
- Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is likely that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Historically, students with a rounded cumulative GPA of 3.5 and above have usually received a percentage calculation that falls in the top 1/3 of a class.
- Please also note that transcripts may not look the same from student-to-student; some individuals may have used this Law School template to provide their grades, while others may have used a version from the College's online system.

COVID-19 PANDEMIC: GRADES FOR THE SPRING 2020 TERM

In response to disruption caused by the global COVID-19 pandemic, the William & Mary Law School faculty voted to require that every course taught at the Law School during the Spring 2020 term be graded Pass/Fail. This change to Pass/Fail grading for the Spring 2020 term impacts members of our Classes of 2020, 2021, and 2022. Please note that "Pass" grades in courses graded on a Pass/Fail basis do not affect a student's GPA. As a result, class ranks for the Classes of 2020 and 2021 were not re-calculated following the Spring 2020 term, and the Class of 2022 received their initial ranking only after the Fall 2020 term.

Transcript Data	
STUDENT INFORMATION	
Name :	Kole F. Donaldson
Curriculum Information	
Current Program	
Juris Doctor	
College:	School of Law
Major and Department:	Law, Law
***Transcript type:WEB is NOT Official ***	
DEGREES AWARDED	
Sought:	Juris Doctor
Degree Date:	

Curriculum Information**Primary Degree****College:** School of Law**Major:** Law

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Institution:	59.000	59.000	59.000	37.000	133.80	3.61

INSTITUTION CREDIT -Top-**Term: Fall 2019**

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	101	LW	Criminal Law	A	4.000	16.00	
LAW	102	LW	Civil Procedure	B+	4.000	13.20	
LAW	107	LW	Torts	A	4.000	16.00	
LAW	130	LW	Legal Research & Writing I	A-	2.000	7.40	
LAW	131	LW	Lawyering Skills I	P	1.000	0.00	

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	52.60	3.75
Cumulative:	15.000	15.000	15.000	14.000	52.60	3.75

Unofficial Transcript

Term: Spring 2020

Term Comments: Universal Pass/Fail grading was mandated by the faculty for all Spring 2020 Law classes due to the COVID-19 pandemic. Students had no option to choose ordinary letter grades.

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	108	LW	Property	P	4.000	0.00	
LAW	109	LW	Constitutional Law	P	4.000	0.00	
LAW	110	LW	Contracts	P	4.000	0.00	
LAW	132	LW	Legal Research & Writing II	P	2.000	0.00	
LAW	133	LW	Lawyering Skills II	P	2.000	0.00	

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	0.000	0.00	0.00
Cumulative:	31.000	31.000	31.000	14.000	52.60	3.75

Unofficial Transcript

Term: Fall 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	117	LW	The Legal Profession	B+	3.000	9.90	
LAW	309	LW	Evidence	B+	4.000	13.20	
LAW	400	LW	First Amend-Free Speech & Pres	A	3.000	12.00	
LAW	730	LW	Advanced Brief Writing	P	2.000	0.00	
LAW	760	LW	Wm & Mary Law Review	P	1.000	0.00	

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	10.000	35.10	3.51
Cumulative:	44.000	44.000	44.000	24.000	87.70	3.65

Unofficial Transcript

Term: Spring 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	140B	LW	Adv Writing & Practice: Civil	B+	2.000	6.60	
LAW	401	LW	Crim Proc I (Investigation)	B+	3.000	9.90	
LAW	453	LW	Administrative Law	A-	3.000	11.10	
LAW	529	LW	The Military Commissions Sem	A-	2.000	7.40	
LAW	704	LW	ILR Moot Court	H	1.000	0.00	
LAW	760	LW	Wm & Mary Law Review	P	1.000	0.00	
LAW	780	LW	Puller Vet Cln-Dis Comp & Apls	A-	3.000	11.10	

Term Totals (Law - First Professional)

Attempt	Passed	Earned	GPA	Quality	GPA
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PAGE 4 OF 4

KOLE DONALDSON

		Hours	Hours	Hours	Hours	Points	
Current Term:		15.000	15.000	15.000	13.000	46.10	3.54
Cumulative:		59.000	59.000	59.000	37.000	133.80	3.61
Unofficial Transcript							
TRANSCRIPT TOTALS (LAW - FIRST PROFESSIONAL)					-Top-		
	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA	
Total Institution:	59.000	59.000	59.000	37.000	133.80		3.61
Total Transfer:	0.000	0.000	0.000	0.000	0.00		0.00
Overall:	59.000	59.000	59.000	37.000	133.80		3.61
Unofficial Transcript							
COURSES IN PROGRESS		-Top-					
Term: Fall 2021							
Subject	Course	Level	Title			Credit Hours	
LAW	410	LW	Conflict of Laws			3.000	
LAW	415	LW	The Federal Courts			4.000	
LAW	619	LW	Supreme Court Seminar			2.000	
LAW	704	LW	ILR Moot Court			1.000	
LAW	720	LW	Trial Advocacy			3.000	
Unofficial Transcript							

[[Overall Financial Aid Status](#) | [Financial Aid Eligibility Menu](#)]

RELEASE: 8.7.1

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Hampden-Sydney College

ID : 346258

Name : Kole Frederick Donaldson

Undergraduate Division

Advisors : Dr. Robert H. Blackman
Honors Advisor

Course Number	Title	CR Type	Grade	Rpt	Hrs Att	Hrs Ern	Hrs Gpa	Qual Pts	GPA
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AP or Transfer Work : Advanced Placement

Organization : Advanced Placement

ECON 101	Economics (Micro)	TR	AP		0.00	3.00	0.00	0.00	
ENGL ELE	English Literature and Comp	TR	AP		0.00	3.00	0.00	0.00	
GVFA 101	Government and Politics (US)	TR	AP		0.00	3.00	0.00	0.00	
HIST 111	US History	TR	AP		0.00	3.00	0.00	0.00	
HIST 112	US History	TR	AP		0.00	3.00	0.00	0.00	
HIST ELE	World History	TR	AP		0.00	3.00	0.00	0.00	
HIST ELE	World History	TR	AP		0.00	3.00	0.00	0.00	
PSYC 102	Psychology	TR	AP		0.00	3.00	0.00	0.00	
RHET 101	English Language and Comp	TR	AP		0.00	3.00	0.00	0.00	

Term Totals : 0.00 27.00 0.00 0.00 0.0000

Career Totals : 0.00 27.00 0.00 0.00 0.0000

2015-2016 : Fall

HIST305	The Age of Enlightenment	ST	A		3.00	3.00	3.00	12.00	
LATN301	Masterpieces of Latin Literature	ST	B		3.00	3.00	3.00	9.00	
MATH141	Calculus I	ST	A		4.00	4.00	4.00	16.00	
PHIL102	Introduction to Philosophy	ST	A		3.00	3.00	3.00	12.00	
WCUL101	Beginning to 900 C.E.	ST	A		3.00	3.00	3.00	12.00	

Honors : Dean's List

Term Totals : 16.00 16.00 16.00 61.00 3.8125

Career Totals : 16.00 43.00 16.00 61.00 3.8125

2015-2016 : Spring

HIST202	England and the British Empire	ST	A		3.00	3.00	3.00	12.00	
HIST490	Great Works in History	ST	A		1.00	1.00	1.00	4.00	
HONS102	Introductory Honors	ST	A		3.00	3.00	3.00	12.00	
PHIL302	Modern Philosophy: Rationalists	ST	A		3.00	3.00	3.00	12.00	
RELI102	Introduction to Biblical Studies	ST	A		3.00	3.00	3.00	12.00	
WCUL102	900-1800 C.E.	ST	A		3.00	3.00	3.00	12.00	

Honors : Dean's List

Term Totals : 16.00 16.00 16.00 64.00 4.0000

Career Totals : 32.00 59.00 32.00 125.00 3.9062

2016-2017 : Fall

FREN101	Introduction to French	ST	A		3.00	3.00	3.00	11.10	
GVFA140	Introduction to World Politics	ST	A		3.00	3.00	3.00	11.10	
HIST203	Russia	ST	A		3.00	3.00	3.00	11.10	
RELI324	Cross of Christ: History and Interp	ST	A		3.00	3.00	3.00	12.00	
RHET102	Principles/Practice of Good Writin	ST	A		3.00	3.00	3.00	12.00	

Honors : Dean's List

Term Totals : 15.00 15.00 15.00 57.30 3.8200

Career Totals : 47.00 74.00 47.00 182.30 3.8787

2016-2017 : Spring

FREN102	Introduction to French	ST	A		3.00	3.00	3.00	12.00	
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Hampden-Sydney College

ID : 346258

Name : Kole Frederick Donaldson

Undergraduate Division

Advisors : Dr. Robert H. Blackman
Honors Advisor

Course Number	Title	CR	Type	Grade	Rpt	Hrs Att	Hrs Ern	Hrs Gpa	Qual Pts	GPA
2016-2017 : Spring										
HIST272	Roman History	ST		A		3.00	3.00	3.00	12.00	
HIST385	Special Topics in History	ST		A-		3.00	3.00	3.00	11.10	
HIST485	Special Topics in History	ST		A		3.00	3.00	3.00	12.00	
HONS102	Introductory Honors	ST		A		3.00	3.00	3.00	12.00	
INDS440	Leadership and Ethics	ST		A		3.00	3.00	3.00	12.00	
RHET000	Rhetoric Proficiency Exam	PF		P		0.00	0.00	0.00	0.00	
Honors : Dean's List						Term Totals :	18.00	18.00	18.00	71.10 3.9500
						Career Totals :	65.00	92.00	65.00	253.40 3.8984
2017-2018 : Fall										
BIOL110	Principles of Biology	ST		A		3.00	3.00	3.00	12.00	
BIOL151	Laboratory Principles of Biology	ST		A		1.00	1.00	1.00	4.00	
FREN201	Intermediate French	ST		A		3.00	3.00	3.00	12.00	
GCUL104	1500 CE to Present	ST		A		3.00	3.00	3.00	12.00	
GVFA225	Politics of the Middle East	ST		A		3.00	3.00	3.00	12.00	
RELI323	Theology and Literature	ST		A		3.00	3.00	3.00	12.00	
Honors : Dean's List						Term Totals :	16.00	16.00	16.00	64.00 4.0000
						Career Totals :	81.00	108.00	81.00	317.40 3.9185
2017-2018 : Spring										
FREN202	Intermediate French	ST		A		3.00	3.00	3.00	12.00	
HIST299	Introduction to Historical Methods	ST		A		3.00	3.00	3.00	12.00	
PHIL201	Logic	ST		A		3.00	3.00	3.00	12.00	
PHYS108	Meteorology	ST		A		3.00	3.00	3.00	12.00	
RELI327	Studies in Christian Theology	ST		A		3.00	3.00	3.00	12.00	
Honors : Dean's List						Term Totals :	15.00	15.00	15.00	60.00 4.0000
						Career Totals :	96.00	123.00	96.00	377.40 3.9312
2017-2018 : Summer										
Organization : IAU College (Institute for American Universities)										
FREN300	Advanced French I	TR		A		0.00	3.00	0.00	0.00	
VISU204	Archeology of Ancient Prov	TR		A-		0.00	3.00	0.00	0.00	
						Term Totals :	0.00	6.00	0.00	0.00 0.0000
						Career Totals :	96.00	129.00	96.00	377.40 3.9312
Study Abroad France										
2018-2019 : Fall										
BIOL130	Bioethics	ST		A		3.00	3.00	3.00	12.00	
FREN305	Advan Composition/Conversation	ST		A		3.00	3.00	3.00	12.00	
HIST499	Colloquium	ST		A		3.00	3.00	3.00	12.00	
HONS497	Honors Capstone	ST		A		3.00	3.00	3.00	12.00	
RELI202	Religions of South Asia	ST		A		3.00	3.00	3.00	12.00	

Hampden-Sydney College

ID : 346258

Name : Kole Frederick Donaldson

Undergraduate Division

Advisors : Dr. Robert H. Blackman
Honors Advisor

Course Number	Title	CR Type	Grade	Rpt	Hrs Att	Hrs Ern	Hrs Gpa	Qual Pts	GPA
2018-2019 : Fall									
RELI444	Pre-Thesis Seminar	ST	A		1.00	1.00	1.00	4.00	
Honors : Dean's List		Term Totals :			16.00	16.00	16.00	64.00	4.0000
		Career Totals :			112.00	145.00	112.00	441.40	3.9410
2018-2019 : Spring									

FREN385	Special Topics in French	ST	A		3.00	3.00	3.00	12.00	
GVFA432	Constitutional Law: First Amendm	ST	A		3.00	3.00	3.00	12.00	
HIST206	East Asia	ST	A		3.00	3.00	3.00	12.00	
HONS498	Honors Capstone	ST	A		3.00	3.00	3.00	12.00	
RELI445	Colloquium	ST	A		3.00	3.00	3.00	12.00	
Honors : Dean's List		Term Totals :			15.00	15.00	15.00	60.00	4.0000
		Career Totals :			127.00	160.00	127.00	501.40	3.9480

Class rank: 3 of 188

Division Career Totals : 127.00 160.00 127.00 501.40 3.9480**Degree Information :**

(1) 'Bachelor of Arts' Date Conferred : 05/11/2019

Major(s)

History

Minor(s)

Religion

Honor(s)

summa cum laude

College Honors

Allison Orr Larsen
Professor of Law and Director, Institute
of the Bill of Rights Law

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Phone: 757-221-7985
Fax: 757-221-3261
Email: amlarsen@wm.edu

June 03, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Applicant Kole Donaldson

Dear Judge Hanes:

I am a law professor at William and Mary law school and a 2L student of mine, Kole Donaldson, has applied to be your law clerk. I certainly recommend Kole for the job.

I taught Kole in my constitutional law class in the spring of 2020, a class with approximately 50 students in it. Right away Kole impressed me. His instincts for constitutional law arguments were spot-on from the start. I was particularly struck by how quickly Kole noticed contradictions in cases and how he was able to easily tap into the normative concerns underlying each constitutional debate we tackled. In my experience most 1L students are able to track the doctrinal development of constitutional law, but only the most sophisticated students come to understand the importance of the "why does this matter" questions. Kole articulated and asked questions about those deep theoretical issues right away. It was this characteristic that led me to approach Kole after class early in the semester and encourage him to keep taking classes like constitutional law. Kole strikes me as a "lover of the law" (as they say) and as a person whose deep curiosity will serve him well both in his legal education and beyond.

Kole did well on my con law exam which due to the COVID-19 pandemic was only graded pass / fail (and Kole passed). My exam comes with strict word-limits and time-limits. I was therefore particularly impressed with Kole's ability on that exam to convey arguments concisely: he articulated analogies to precedent and tapped into normative sentiments in a sophisticated manner all while not losing focus and sticking to the point.

In sum, Kole is a bright, articulate, and conscientious law student. I have no doubt he will make a terrific law clerk. Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/

Allison Orr Larsen
Professor of Law and Director, Institute
of the Bill of Rights Law
William & Mary Law School
amlarsen@wm.edu; (757) 221-7985

Allison Orr Larsen - amlarsen@wm.edu - (757) 221-7985

Jennifer R. Franklin
Professor of the Practice of Law

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Phone: 757-221-2488
Fax: 757-221-3261
Email: jrfranklin@wm.edu

June 03, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am very pleased to write this letter recommending Kole Donaldson for a clerkship in your chambers.

As a Professor of the Practice of Legal Writing at William & Mary, I taught Kole during his first year. Kole is a diligent, thoughtful student, who was always prepared for class and actively participated in discussions. Kole progressively improved in my class, and turned in excellent work. In the spring semester, last year when we moved to a completely virtual format and changed our grading scheme to pass/fail, Kole did not waiver. His final spring memo demonstrated his continued commitment to excellence. As a member of the moot court team, Kole was in my advanced brief writing class this fall, where he continued to show his commitment. His performance in my class earned him a place on a second-year only team that is being sent to the products liability moot court competition. It is the rare student that competes in the spring of their 2L year without a third-year mentor on the team. Kole has earned that place and his preparation for competition proves that I made the correct choice.

I have had continued interactions with Kole following our classes together, as he has taken the time to consult with me, and I have had the opportunity to help prepare him for moot court arguments. Kole takes constructive criticism very well, and indeed, he actively seeks it. Kole is always very professional, deferential, and engaging.

Kole would be an asset to your chambers. His skills are well-developed, he is a pleasure to work with, and he will seek guidance where appropriate. If there is anything I can do to further help his application or answer any questions you may have, please do not hesitate to get in touch with me. Due to the pandemic, please use my cell phone if you need to contact me by phone. That number is 804-683-1038.

Sincerely,

/s/

Jennifer R. Franklin
Professor of the Practice of Law

Jennifer R. Franklin - jrfranklin@wm.edu - 757-221-2488



May 31, 2021

Re: Letter of Recommendation for Kole Donaldson

To Whom it May Concern:

It is my pleasure to recommend Kole Donaldson for a clerkship with your chambers. Kole interned with the West Virginia Attorney General's Appellate Division in the summer of 2020 through the Blackstone Legal Fellowship Program. During that time, I worked with Kole on a near daily basis. As I discuss below, Kole is extraordinary; he consistently displays a strong work ethic, professional demeanor, and produces high quality work. I recommend him without reservation.

During his tenure with the Appellate Division, Kole displayed an astute grasp of both procedural and substantive law. His ability to disentangle complicated legal and factual issues to arrive at a sound conclusion was remarkable. As you will see in his writing sample, Kole's ability to evaluate an opposing party's argument and craft a clear, well-supported brief in response is impressive. I am confident these traits will be an asset to your chambers given that Kole has the ability to tackle even the most complicated legal disputes and provide supported, well-reasoned guidance and recommendations to you.

Kole's work ethic and desire to tackle difficult projects is also reflected by the substantial assistance he provided to me (and our office, generally) on a number of criminal and habeas corpus matters. Kole took on extra work during his time here—surpassing the typical amount of cases we dedicate to a summer intern. And, on both a personal and professional note, Kole was easy to get along with and always receptive to feedback.

The reality is that it is an honor for me to write this letter of recommendation for Kole. He possesses all of the hallmarks of a future legal star, and I have no doubt he will enjoy tremendous success throughout his career. In the same vein, if given the privilege of clerking for you, I have no doubt that Kole will be an incredible asset to your chambers.

I am happy to discuss this further and may be reached at the contact information below.

Sincerely,

/s/ Gordon L. Mowen, II

Gordon L. Mowen, II

Jon Orndorff – Partner (WV and KY)
jon.orndorff@om-pltc.com

Kelly Calder Mowen – Partner (WV, KY & VA)
kelly.mowen@om-pltc.com

Gordon L. Mowen, II – Counsel (WV)
gordon.mowen@om-pltc.com

135 Corporate Centre Drive, Suite 524, Scott Depot, WV 25560 | 555.123.4567

Kole Donaldson

300 Whitworth Way, # 110 | Williamsburg, VA 23185
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WRITING SAMPLE

I prepared this appellate brief for the Rendigs National Products Liability Moot Court Competition. The first half of the full brief was written by my competition partner, so I have only included the second half of the brief, which is my own work. I have only included the argument section to maximize the legal analysis in this writing sample, and because my partner contributed substantially to the other sections of the brief. However, I am happy to provide a copy of the full brief upon request. I have included below a summary of the facts and the issues covered in my argument.

BACKGROUND

The State of Fremont was the fake jurisdiction created for the moot court problem, and there are a few fake cases from that jurisdiction. This case involved a manufacturer, Edison, who created a semi-autonomous vehicle that used sensors to detect objects and other vehicles in the road and drive itself with almost no driver input. The petitioner was injured when the car's sensors failed to detect a stationary bear in the road. The manufacturer was aware that the sensors struggled to detect stationary objects when the vehicle was traveling over 35 mph, but the manufacturer chose not to include additional sensors to remedy the sensor failures. My partner and I represented the manufacturer, Edison, Inc., the respondent. My section of the brief involved the trial court's rejection of the petitioner's jury instruction, which included a post-sale duty to retrofit. The issue before the court was whether a duty to retrofit should be adopted, given that the trial court rejected the jury instruction including this duty, and the court of appeals adopted the duty but held that the trial court's failure to grant the jury instruction was harmless error, because the duty did not apply to Edison.

II. The State of Fremont should not adopt the duty to retrofit in strict liability design defect cases, nor apply such a duty to Edison.

This Court should not impose the duty to retrofit upon manufacturers in design defect cases. If the Court were to adopt such a duty, as defined by the Court of Appeals, it would not apply to the Respondent, Edison. Section 5552.321 of the Fremont Revised code states that “[o]ne who sells any product in a defective condition unreasonably dangerous to the driver ... is subject to liability” if the driver is injured, and the vehicle reaches the driver without substantial change. Fremont Rev. Code § 5552.321. This theory of liability requires that the jury’s determination be focused solely upon the conduct of the manufacturer prior to the product’s sale. *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 326 (Mich. 1995). The State of Fremont also recognizes the post-sale duty to warn. *Shane v. Smith*, 657 XE 720, 725 (Fremont 1989); R. at 14. Under this duty, a manufacturer must warn consumers if the product poses a substantial risk to consumers likely unaware of the risk, the warning can be “effectively communicated to and acted on by” the consumers, and the risk of harm is great enough “to justify the burden of providing a warning.” Restatement (Third) of Torts: Prod. Liab. § 10 (1998).

The State of Fremont does not recognize a post-sale duty to retrofit, defined as “[a] duty to upgrade or improve a product” after it has reached the consumer. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003). The adoption of a duty to retrofit is the responsibility of the Legislature or an administrative agency better able to ascertain the circumstances under which such a duty should be applied. *Id.* If such a duty is adopted, however, it should apply only to design defects present at the time of manufacture. *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1307 (Kan. 1993).

A. The trial court committed no abuse of discretion in refusing to instruct the jury on a duty to retrofit.

The trial court did not abuse its discretion by refusing to grant Petitioner a jury instruction including the duty to retrofit. “Adequate jury instructions ... are those that fairly and reasonably convey the issues and provide correct principles of applicable law.” *Sanders v. Bain*, 722 So. 2d 386, 388 (La. Ct. App. 1998). The court should only overturn a jury instruction and the verdict when “the instruction misled the jury to such an extent that it resulted in a manifest injustice.” *Id.* Prior to the court of appeals’ decision, there was no common law duty to retrofit in the State of Fremont. R. at 6. For design defect cases, the jury’s determination should be focused solely upon the conduct of the manufacturer prior to the product’s sale. *Gregory*, 538 N.W.2d at 326. The existence of any further post-sale duty to retrofit is the responsibility of the legislature or an administrative agency better able to ascertain the circumstances under which such a duty should be enforced. *Id.*

The majority of jurisdictions that have considered the issue have determined that no continuing duty to retrofit exists. *See Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1298 (Haw. 1997); R. at 15. In *Gregory v. Cincinnati Inc.*, the Michigan Supreme Court held that no continuing duty to repair or retrofit existed, and that evidence of the manufacturer’s conduct after the time of manufacture “improperly shift[ed] the focus from the pre-manufacturing decision and [had] the potential to taint any finding of liability.” 538 N.W.2d at 326. In 1986, the plaintiff was injured by a press brake on an industrial machine. *Id.* at 327. The machine lacked “adequate guarding” to prevent an injury when the plaintiff reached his hand under the press brake. *Id.* The machine was manufactured in 1964, when there was no evidence any other similar machines possessed such guarding. *Id.* The court instructed the jury “that a manufacturer [had] a duty to incorporate new advances in technology and that a manufacturer who learn[ed] of a design defect after the product [had] been sold [had] a duty to take reasonable actions to correct the defect.” *Id.* at 328 (internal quotations omitted). Such an instruction, however, risks confusion, because any continuing duty to retrofit exists only if there is “an actionable problem at the

point of manufacture.” *Id.* at 328. A prima facie case for liability can already be established for such a defect under the risk-utility test. Imposing an additional duty to retrofit, which considers post-manufacture conduct, was “unnecessary and unwise.” *Id.* at 333-34. Therefore, there was no duty to retrofit.

In the State of Fremont, like many other jurisdictions, a post-sale duty to warn already exists. *Shane v. Smith*, 657 XE 720, 725 (Fremont 1989). In *Patton v. Hutchinson Wil-Rich Manufacturing Co.*, the Kansas Supreme Court held that a post-sale duty to retrofit did not exist, and the creation of any post-sale duties beyond the duty to warn “should be left to administrative agencies and the legislature.” 861 P.2d 1299, 1316 (Kan. 1993); *see also Gregory*, 538 N.W.2d at 326. In that case, a company developed a cultivator without a certain safety feature that was unavailable at the time of manufacture. *Patton*, 861 P.2d at 1304. While future cultivators included this safety feature, the cultivator that injured the plaintiff did not. *Id.* The court acknowledged that there was a significant risk of injury and death. *Id.* at 750. The manufacturer had notice of that danger, they knew of a new safety device that could be installed, and the cost of making such safety devices would not be significant. *Id.* Nevertheless, the court determined that expanding a manufacturer’s post-sale duties from a duty to warn to a duty to recall or retrofit was a decision best made by administrative agencies and the legislature, as suggested by federal law. *Id.* at 763 (citing Consumer Product Safety Act, 15 U.S.C. § 2064 (1988)). The legislature and administrative agencies are better equipped to undertake the level of research and deliberation necessary to determine when such a duty should be imposed. *See Gregory*, 538 N.W.2d at 326. Therefore, there was no post-sale duty to retrofit. *Id.* at 744.

In this case, Edison created the Marconi, a semi-autonomous vehicle. R. at 2. The Marconi can operate with little driver input in Autodrive when the driver has both hands on the steering wheel. R. at 3. At speeds above thirty-five miles per hour, the vehicle was less effective at detecting stationary objects. R. at 5. Nothing related to the sensors’ ability to detect such objects, however, affects the driver’s ability to take control of the vehicle and avoid obstacles. R. at 3. In fact, the jury returned a verdict for